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No. ___ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PACESETTER CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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September, 1997

77 pp

QUESTIONS PRESENTED

1. Whether this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L.Ed.2d 985, 115 S.Ct. 1920 (1995), is in direct conflict with the decision below, in which the Ninth Circuit determined that the holding of *First Options* has no applicability in disputes arising under section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), as amended.

2. Whether the decision of the Ninth Circuit in this case creates a conflict among the circuits regarding the applicability of *First Options* to cases arising under section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), as amended.

PARTIES TO THE PROCEEDING

The parties to the proceeding below and before this Court are:

1. Pacesetter Construction Company, Inc.; and[1/]

2. Carpenters 46 Northern California Counties Conference Board.

[1/] Pacesetter Construction, Inc. has no parent company; nor does it have any subsidiary that is not wholly owned.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

A. Introduction 7

B. The Decision Below Is In Direct Conflict With The Decision of This Court In *First Options* 8

There Are No "Fundamental Policy Differences" Underlying Commercial And Labor Arbitrations Which Justify The Ninth Circuit's Repudiation Of First Options In The Context Of Section 301 16

Page

C. There Is A Clear Conflict Between The Circuits Regarding The Applicability Of *First Options* To Cases Arising Under Section 301 . . . 22

The Decision Below Has Widened An Already Existing Split Among The Circuits 25

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases

Aircraft Braking Systems Corp. v. Local 856,
UAW, 97 F.3d 155 (6th Cir. 1996),
cert. den. ___ U.S.___, 117
S.Ct. 1311, 137
L.Ed.2d 475 (1997) 22, 23, 26

AT&T Technologies v. Communications Workers,
475 U.S. 643, 648-649,
89 L.Ed.2d 648,
106 S.Ct. 1415 (1986) 9-11, 18, 20

Braxton v. United States,
500 U.S. 344, 347,
114 L.Ed.2d 385,
111 S.Ct. 1854 (1991) 22, 24

Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distributor Co.,
832 F.2d 507 (9th Cir. 1987) 16

Camping Construction v. District Council of Ironworkers,
915 F.2d 1333, 1338 (9th Cir. 1990),
cert. denied, 500 U.S. 905 and 500 U.S.
953 (1991) 22

Page

Dean Witter Reynolds Inc v. Byrd,
470 U.S. 213, 219-220,
84 L.Ed.2d 158,
105 S.Ct. 1238 (1985) 19, 20

Deklewa v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 3,
282 N.L.R.B., No. 284, 1986-87
NLRB Dec. (CCH) ¶ 18,549 (Feb. 20, 1987) 16

Excel Corp. v. United Food and Commercial Workers,
102 F.3d 1464, 1467 (8th Cir. 1996) 24, 26

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938,
131 L.Ed.2d 985,
115 S.Ct. 1920 (1995) . . . . . passim

Franklin Electric Co. v. International Union, UAW,
886 F.2d 188, 192 (8th Cir. 1989) 26

George Day Const., v. United Broth. of Carpenters,
722 F.2d 1471 (9th Cir. 1984) . . . 4, 13, 14, 25, 26

International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 3 v. NLRB,
843 F.2d 770 (3rd Cir. 1988) 16

Page

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 631 v. Silver State Disposal Service,
109 F.3d 1409 (9th Cir. 1997) 25

Interstates Brands v. Chauffers, Teamsters Loc. 135,
909 F.2d 885 (6th Cir. 1990) 25

John Wiley & Sons, Inc. v. Livingston,
376 U.S. 543, 546-547,
11 L.Ed.2d 898, 84
S.Ct. 909 (1964) 9

Kaplan v. First Options of Chicago, Inc.,
19 F.3d 1503, 1510 (3rd Cir. 1994) 17

Lawrence v. Chater,
516 U.S. ___, 133
L.Ed.2d 545,
116 S.Ct. 604 (1996) 5, 6

Local 719, American Bakery & Confectionery Workers of America, AFL-CIO v. National Biscuit Company,
378 F.2d 918, 921 (3rd Cir. 1967) 26

Local 744, International Brotherhood of Teamsters v. Hinckley & Schmitt, Inc.,
76 F.3d 162 (7th Cir. 1996) 24

McCarthy v. Azure,
22 F.3d 351, 355 (1st Cir. 1994) 19, 21

Page

Moses H. Cone Hospital v. Mercury Construction Corporation,
460 U.S. 1, 24-25,
74 L.Ed.2d 765,
103 S.Ct. 927, (1983) 19

Operative Plasterers v. Intern. Brotherhood of Painters,
954 F.Supp. 563, 565 (E.D.N.Y.1997) 24

Pacesetter Construction Company, Inc., v. Carpenters 46 Northern California Counties Conference Board,
116 F.3d 436 (9th Cir. 1997) 1, 2, 6

Painewebber Inc. v. Elahi,
87 F.3d 589 (1st Cir. 1996) 20

Pennsylvania Power Co. v. Local Union No. 272 of IBEW,
886 F.2d 46, 50 (3rd Cir. 1989) 17, 26, 27

S+L+H S.p.A v. Miller-St. Nazianz, Inc.,
988 F.2d 1518 (7th Cir. 1993) 18

Southland Corp. v. Keating,
465 U.S. 1, 10,
79 L.Ed.2d 1,
104 S.Ct. 852, 858 (1984) 20

Stead Motors v. Automotive Machinists Lodge,
886 F.2d 1200, 1205 (9th Cir. 1989) 18

Page

Steelworkers v. American Mfg. Co.,
363 U.S. 564, 570-571,
4 L.Ed.2d 1403,
80 S.Ct. 1343 (1960) 9, 19

Steelworkers v. Enterprise Wheel & Car. Corp.,
363 U.S. 593, 596,
4 L.Ed.2d 1424,
80 S.Ct. 1358 (1960) 19

Steelworkers v. Warrior & Gulf Navigation Co.,
363 U.S. 574, 582,
4 L.Ed 2d 1409,
80 S.Ct. 1347 (1960) 9, 11, 12, 18-20

Textile Workers Union v. Lincoln Mills,
353 U.S. 448,
1 L.Ed.2d 972,
77 S.Ct. 912 (1957) 8, 28

Three Valleys Mun. Water Dist. v. E.F. Hutton,
925 F.2d 1136 (9th Cir. 1991) 20

Torrington Co. v. Metal Products Workers Union, Local 1685, UAW,
362 F.2d 677, 680-681, n. 6
(2nd Cir. 1966) 27

United Brotherhood of Carpenters and Joiners of America, Local No. 1780 v. Desert Palace, Inc.,
94 F.3d 1308, 1311 (9th Cir. 1996) 17, 18

Page

Vic Wertz Distributing v. Teamsters Local 1038,
898 F.2d 1136, 1138-39 (6th Cir. 1990) 25

Virginia Carolina Tools, Inc. v. International Tool,
984 F.2d 113 (4th Cir.),
cert. den., 508 U.S. 960,
113 S.Ct. 2930,
124 L.Ed.2d 681 (1993) 18

Volt Info. Sciences v. Stanford Univ.,
489 U.S. 468, 478,
103 L.Ed.2d 488,
109 S.Ct. 1248 (1989) 18-20

Statutes

9 U.S.C. §1, *et seq* 5, 10

9 U.S.C. §9 3

28 U.S.C. §1254(1) 2

29 U.S.C. §158(f) 3, 21, 24

29 U.S.C. §185 . . . . . passim

Rule 10.1(a) 22

Publications

Cox, Reflections Upon Labor Arbitration,
72 Harv.L.Rev. 1482, 1509 (1959) 10, 12

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

Pacesetter Construction Company, Inc. respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals For The Ninth Circuit (App., *infra*, 2a-16a), which is the subject of this petition is reported as *Pacesetter Construction Company, Inc., v. Carpenters 46 Northern California Counties Conference Board*, 116 F.3d 436 (9th Cir. 1997). The previously

unpublished memorandum disposition of the Court of Appeals (App., *infra*, 17a-20a), which this Court vacated in its Order dated October 2, 1995, is now reported as an appendix to *Pacesetter Construction Company, Inc.*, 116 F.3d at 441.

This Court's October 2, 1995 Order, No. 94-2090 (App., *infra* 1a), is reported as *Pacesetter Constr. Co. v. Carpenters 46 No. Cal.Ctys. Conf. Bd.*, 516 U.S. ___, 133 L.Ed.2d 10, 116 S.Ct. 43 (1995). The opinion of the District Court (App., *infra*, 21a-31a), is unreported.

JURISDICTION

The jurisdiction of the district court was invoked under 29 U.S.C. §185 when the Respondent sought confirmation of an arbitration award. The Court of Appeals entered its first judgment on March 22, 1995. On October 2, 1995, this Court granted Pacesetter's petition for certiorari, vacated the March 22, 1995 judgment and remanded to the United States Court of Appeals For The Ninth Circuit for further consideration in light of an intervening Supreme Court decision. On remand from this Court, the Court of Appeals entered its judgment on June 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

A. Section 8(f) of the National Labor Relations Act, 29 U.S.C. §158(f), as amended.

B. Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185, as amended.

C. Section 9 of the Federal Arbitration Act, 9 U.S.C. §9.

Relevant portions of these statutory provisions are reproduced at App., *infra*, 32a-38a.

STATEMENT OF THE CASE

A detailed factual background of this case was previously presented to the Court in Pacesetter Construction Company's (hereafter "Pacesetter" or "Petitioner") first Petition for Writ of Certiorari, No. 94-2090, pp. 2-8, filed in June 1995, and granted on October 2, 1995. In addition, the Court of Appeals' summary recitation of the factual background in the decision below is substantially accurate for purposes of this petition. App., *infra*, 7a-10a.

In brief, Pacesetter signed pre-hire agreements with the Carpenters 46 Northern California Counties Conference Board (hereafter "Union") in 1971 and 1974.[2/] Pacesetter did not sign an agreement with the Union at any time after 1974. Pacesetter has contended throughout these proceedings that it repudiated the pre-hire agreement in 1975 and that it ceased

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[2/] Pre-hire agreements are authorized under 29 U.S.C §158(f)

doing business in 1979, and thereafter, operated as a nonunion contractor.

This case arose when the Union filed a grievance in 1991, over fifteen years after repudiation.[3/] At a hearing before an arbitration panel (the Board of Adjustment), Pacesetter appeared and repeatedly objected to the arbitrability of the Union's grievance on the ground that it was not a party to a contract with the Union. Nevertheless, the Board of Adjustment issued a decision and award upholding the Union's grievance. App., *infra*, 7a, 9a.

The district court confirmed the award, holding that, because Pacesetter did not first present "the repudiation issue to the court without submitting to arbitration," it had consented to the jurisdiction of the arbitration panel to determine the issue of arbitrability. The district court also held that under prevailing Ninth Circuit authority, most notably *George Day Const., v. United Broth. of Carpenters*, 722 F.2d 1471 (9th Cir. 1984), Pacesetter could not "relitigate" the arbitrability issue in a judicial forum. App., *infra*, 9a.

On March 22, 1995, the United States Court of Appeals for the Ninth Circuit entered judgment affirming the decision of the district court. App., *infra*, 9a-10a, 17a-20a. The appellate court held that because Pacesetter did not preserve the issue of repudiation in "ways in which [a] party to arbitration can preserve an issue for judicial determination," Pacesetter had "implied its consent to have the Board decide whether it repudiated the Agreement." App., *infra*, 19a-20a.

[3/] Pacesetter appeared before the same Board of Adjustment in 1980 and successfully defended against the Union's claim that it was operating as a nonunion contractor.

In June 1995, Pacesetter petitioned this Court for a *writ of certiorari* to review the March 22, 1995 judgment of the Court of Appeals in light of the Court's intervening decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L.Ed.2d 985, 115 S.Ct. 1920 (1995). In its petition, Pacesetter argued vigorously that although *First Options* arose in a commercial setting under the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, the holding of that case was nevertheless controlling precedent in cases arising under §301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), as amended ("§301").

Thereafter, this Court granted Pacesetter's petition, vacated the decision below and remanded the matter ("GVR Order") to the Ninth Circuit for reconsideration in light of the Court's intervening decision in *First Options*. App., *infra*, 1a.

Recently, in *Lawrence v. Chater*, 516 U.S. ___, 133 L.Ed.2d 545, 116 S.Ct. 604 (1996) (per curiam), this Court clarified its standard for issuing a GVR Order on the basis of an intervening event. The Court held:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate.

Chater, 133 L.Ed.2d at 554. Moreover, in his dissenting opinion, Justice Scalia specifically noted that the Court's "GVR

Order" in *this* case fell squarely within that category of GVR Orders in which an intervening event, such as a post judgment decision of this Court, has "cast doubt on the judgment rendered by a lower federal court. . .concerning a federal question." *Id.* at 563 (dissent), citing *Pacesetter Constr. Co. v. Carpenters 46 Northern Cal. Ctys. Conference Bd.*, 516 U.S.___, 133 L.Ed 2d 10, 116 S.Ct. 43 (1995).

Thus, by issuing its GVR Order, this Court concluded that there was a "reasonable probability" that reconsideration in light of *First Options* would render a different result and that the holding of *First Options* "cast doubt" on the decision below. Yet, on remand from this Court, the Ninth Circuit concluded that *First Options* did "not affect the result we reached in Pacesetter's original appeal," (App., *infra,* 16a), because the holding of *First Options* has no applicability in the context of an action arising under Section 301 of the LMRA. App., *infra*, 12a, 14a. The appellate court then proceeded to adhere to principles developed in its pre-*First Options* decisions which are directly at odds with the holding of *First Options*.

Contrary to this Court's unanimous decision in *First Options*, the Ninth Circuit did not look to state law principles to determine if the parties had contractually agreed to submit and be bound by an arbitrator's determination of the arbitrability issue. Instead, the Ninth Circuit placed the burden upon Pacesetter to affirmatively show that it did not "consent" to the arbitrator's determination concerning its own jurisdiction. In short, the Ninth Circuit reversed the presumption established in *First Options*, that absent clear and unmistakable evidence of an agreement to submit and be bound by an arbitrator's determination of the arbitrability question, the party challenging arbitrability is entitled to an independent judicial determination of that question.

Pacesetter now petitions this Court for a *writ of certiorari* to review the Ninth Circuit's most recent decision.

REASONS FOR GRANTING THE PETITION

A. Introduction

Pacesetter petitions for a *writ of certiorari* on the ground that the decision below is in direct conflict with a decision of this Court on an issue of fundamental importance, i.e., the allocation of authority between federal courts and arbitrators to decide the issue of arbitrability. Specifically, Pacesetter contends that the decision below is in direct conflict with the holding in *First Options*.

In *First Options*, this Court, relying upon important principles developed in landmark precedent under LMRA §301, held unanimously that unless there is clear and unmistakable evidence of the parties' agreement to submit the question of arbitrability to an arbitrator, a court must presume that the parties intended a court to decide independently the issue of arbitrability.

In the decision below, the Ninth Circuit determined that the holding of *First Options* has no applicability in an action arising under Section 301, because of "fundamentally different" policy concerns applicable in the commercial arbitration context. Thus, in the Ninth Circuit, a court presented with a dispute concerning an arbitrator's authority to decide the arbitrability question in a §301 case need not apply state law principles of contract formation and need not look for clear and unmistakable evidence of an agreement to arbitrate arbitrability to determine the scope of the arbitrator's authority. This is so, even if the party challenging arbitrability contends that no agreement exists between the parties.

Indeed, pursuant to the decision below, a court need not look for *any* evidence of an agreement to arbitrate arbitrability, much less clear and convincing evidence. Rather, if a party argues that it is not a party to an agreement to arbitrate, a court may "imply" consent to arbitrate arbitrability and find that the party waived its right to a judicial determination of that issue. Pacesetter submits that the Ninth Circuit's decision is in direct conflict with *First Options* and as a result, improperly empowers labor arbitrators to usurp the authority of courts to determine arbitral jurisdiction.

Pacesetter further petitions for a *writ of certiorari* on the ground that the decision below directly conflicts with the decisions of at least two and possibly three other circuits which have applied the principles of *First Options*, without hesitation, in actions arising under Section 301. The Ninth Circuit's decision thus creates a serious conflict in the federal courts regarding the allocation of authority between the federal courts and arbitrators in determining the issue of arbitrability in actions arising under Section 301. This conflict undermines the fundamental national labor policy which demands uniformity in the interpretation and enforcement of the collective bargaining agreements under Section 301. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L.Ed.2d 972, 77 S.Ct. 912 (1957).

B. The Decision Below Is In Direct Conflict With The Decision Of This Court In *First Options*

Almost forty years ago in a series of cases known as the *Steelworkers Trilogy*, this Court made clear that arbitration lies at the heart of our system of industrial self-government and that it is the preferred method for resolving labor disputes. To encourage the use of arbitration, the Court articulated certain primordial principles of law applicable to labor arbitrations.

The first precept developed from the *Trilogy* is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 4 L.Ed 2d 1409, 80 S.Ct. 1347 (1960); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-571, 4 L.Ed.2d 1403, 80 S.Ct. 1343 (1960) (Brennan, J., concurring). This "first principle" of arbitration recognizes that arbitrators derive their authority to resolve disputes only because the parties to that dispute have agreed in advance to submit their grievances to arbitration. *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648-649, 89 L.Ed.2d 648, 106 S.Ct. 1415 (1986).

The second principle of arbitration, which "flows inexorably from the first," *AT&T Technologies*, 475 U.S. at 656, is that the question of arbitrability -- i.e., whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance -- is *undeniably* an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, *not* the arbitrator. *Warrior & Gulf*, 363 U.S. at 582-583. In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-547, 11 L.Ed.2d 898, 84 S.Ct. 909 (1964), this Court reaffirmed this second principle, emphasizing that because the duty to arbitrate is contractual in origin, a compulsory submission to arbitration simply cannot precede a judicial determination that the agreement creates that duty. Finally, in *Warrior & Gulf*, 363 U.S. at 582-583, this Court established that where a contract contains an arbitration clause, there is a presumption of arbitrability which mandates that all doubts "be resolved in favor of coverage."

In *AT&T Technologies*, this Court clarified the basic principle that the question of arbitrability is for a court and *not* the arbitrator to decide. In so doing, the Court commented that the willingness of the parties to enter into agreements that provide for arbitration would be "drastically reduced" if a labor arbitrator had the power to determine his or her own jurisdiction. *AT&T Technologies*, 475 U.S. at 651, citing *Cox, Reflections Upon Labor Arbitration*, 72 Harv.L.Rev. 1482, 1509 (1959). The Court noted that were this indeed the rule, an arbitrator would not be constrained to resolve only those disputes that the parties had agreed to settle through arbitration but would rather be empowered to impose obligations outside the contract "limited only by [the arbitrator's] understanding and conscience." *Id.* at 651. The Court recognized that unbridled arbitral authority would undermine, not encourage collective bargaining and informal resolution of labor disputes:

> This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements, and is antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties.

AT&T Technologies, 475 U.S. at 651.

Against this backdrop, the Court in *First Options* reaffirmed and further refined these basic principles. In *First Options*, a case arising under the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, the Kaplans appeared at an arbitration hearing and objected to the arbitrability of their dispute on the ground that no agreement to arbitrate existed between the parties. *First Options*, 131 L.Ed.2d at 991. Nevertheless, the arbitrator decided that it had the power to rule on the merits of the parties' dispute and did so in favor of First Options of

Chicago. The district court confirmed the award but the Third Circuit reversed, finding that the parties' dispute was not arbitrable. *Ibid.*

In granting certiorari, this Court decided the narrow but important question of *who* should have the primary authority to decide the arbitrability issue -- the court or the arbitrator. The Court held unanimously that, just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, the question of *who* has the primary power to decide arbitrability turns upon the parties' agreement regarding the matter. *First Options*, 131 L.Ed.2d at 992-993.

The Court further held that, in deciding whether parties agreed to arbitrate, courts should apply ordinary state law principles of contract formation. *Id.* at 993. The Court did not stop there, however. Relying upon the important principles developed in two landmark §301 cases, the Court held that courts should apply an *additional qualification* in determining whether parties have agreed that an arbitrator should decide the issue of arbitrability. The Court opined:

> Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so. *AT&T Technologies*, *supra*, at 649; see *Warrior & Gulf*, *supra*, at 583, n. 7. In this manner the law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" -- for in respect to this latter question the law *reverses the presumption*.

First Options., 131 L.Ed.2d at 994 (emphasis added).

Thus, in *First Options*, the Court unequivocally established that, absent clear and unmistakable evidence of an agreement to the contrary, a party challenging an arbitrator's jurisdiction on the ground that no agreement exists between the parties, is entitled to a *presumption* that arbitrability is a question preserved for independent judicial resolution.[4/] Moreover, "silence or ambiguity" may not be interpreted as an agreement to submit arbitrability to arbitration. On the contrary, any ambiguity about the parties' agreement -- which is the very antithesis of "clear and unmistakable evidence of an agreement" -- will necessarily give rise to the presumption that the party challenging arbitrability intended to preserve the issue for independent judicial review.

Finally, in *First Options* this Court held that merely arguing the issue of jurisdiction to an arbitrator does not indicate an agreement to arbitrate arbitrability and forego independent judicial review. *Id.* at 994. Again citing precedent developed in the collective bargaining arena, the Court commented that any other rule would "too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 131 L.Ed.2d at 994, citing *Cox, Reflections Upon Labor Arbitration*, 72 Harv. L.Rev. 1482, 1508-1509 (1959), cited in *Warrior & Gulf*, 363 U.S. at 583, n. 7.

[4/] In contrast, a party challenging the arbitrable nature of a dispute on the ground that it is not within the scope of a valid arbitration agreement, is presumed to have agreed to arbitrate. *Id.* at 994, citing *Warrior & Gulf*, 363 U.S. at 582-583, 4 L.Ed.2d 1409, 80 S.Ct. 1347.

In reconsidering its decision in light of First Options -- as mandated by this Court -- the Ninth Circuit did not apply the holding of *First Options* to the facts of this case but instead determined perfunctorily that *First Options* has no applicability to cases arising under §301. App., *infra*, 12a-14a. The Ninth Circuit reasoned that "fundamentally different policy concerns from those applicable to commercial contracts" precluded the application of First Options to the facts of this case. App., *infra*, 12a.

Thus, even though Pacesetter -- like the Kaplans in *First Options* -- vigorously objected to arbitration on the ground that no agreement existed between the parties, the Ninth Circuit did not apply ordinary state law principles of contract formation and it failed to look for "clear and unmistakable" evidence of an agreement to submit the issue of arbitral jurisdiction to arbitration. Likewise, the Ninth Circuit did not allow Pacesetter the benefit of a presumption, that the issue of arbitrability is preserved for independent judicial review absent clear and unmistakable evidence to the contrary. Rather, the Ninth Circuit held that *George Day Constr. Co. v. United Brotherhood of Carpenters*, 722 F.2d 1471 (9th Cir. 1984), a case upon which the district court in this action relied, and which directly conflicts with *First Options*, survives *First Options* and controls this case. App., *infra*, 14a.

In *George Day Constr. Co.*, 722 F.2d 1471, a case in which an employer challenged arbitrability on the ground that the dispute did not arise under an expired collective bargaining agreement, the Ninth Circuit held that a party can preserve the issue of arbitrability for independent judicial determination only by acting in one of two ways: either by objecting to the arbitrator's authority and refusing to argue the arbitrability issue to the arbitrator; or by making an objection to jurisdiction and an express reservation of the question on the record. *Id.* at

1475. The *George Day* court further held that the party's failure to take action in one of these specified manners constituted that party's "implied consent" to submit the arbitrability issue to the arbitrator and a waiver of that party's right to seek an independent judicial determination of the issue. *Ibid.*

In adhering to its *George Day* decision, the Ninth Circuit effectively turned the standard articulated by this Court in *First Options* on its head. Rather than presume that Pacesetter intended to preserve the issue of arbitrability for independent judicial review, the Ninth Circuit presumed that Pacesetter had consented to arbitrate arbitrability absent clear evidence that "it did not want the arbitrator to exercise jurisdiction over its dispute." App., *infra*, 15a. Placing the burden of preserving the arbitrability issue squarely on the shoulders of Pacesetter, the Ninth Circuit held that because Pacesetter had "appeared before the arbitrator, contested arbitrability and the merits of the dispute,[5/] and made no reservation of its right to reserve the issue of arbitrability for initial determination by a court," it had consented to arbitrate arbitrability and waived its right to independent judicial review of the arbitrability question. App., *infra*, 16a.

By applying the *First Options* presumption in reverse, the Ninth Circuit interposed the concepts of implied consent and waiver for the analytical scheme of *First Options* calling for the application of state law principles of contract formation and clear and unmistakable evidence of an agreement to arbitrate arbitrability. Moreover, the standard established by the Ninth

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[5/] This is somewhat of an overstatement by the Ninth Circuit. Pacesetter admits that it has operated as a nonunion contractor since 1975 when it repudiated the 8(f) agreement with the Union. Thus, the arbitrability question is, and always has been, the only disputed issue in this case.

Circuit for determining *who* has primary authority to decide the arbitrability question cannot be reconciled with the standards or reasoning of *First Options*. Under the standard established in *First Options*, the first and second principles of arbitration require clear and unmistakable evidence of a contract to arbitrate the arbitrability question as a jurisdictional prerequisite to the arbitrator's authority to decide the arbitrability question. Under the standard established by the Ninth Circuit, the contractual foundation of arbitral authority is not paramount. In the Ninth Circuit, a party, like Pacesetter, who argues vigorously that no contract exists between the parties, is denied independent judicial review of the arbitrability question if a court, upon a cursory *post facto* review, determines that that party failed to preserve the issue of arbitrability for judicial review. In effect, a contract may be imposed upon the challenging party based solely upon conduct occurring at the arbitration hearing.

If the Ninth Circuit had followed *First Options*, a contrary result would have been unavoidable. Pacesetter could not possibly have "clearly and unmistakably agreed" to submit and be bound by the arbitrator's determination of the arbitrability question if, at the same time it was arguing that no pre-hire agreement had existed between the parties for the prior fifteen years. As recognized by the Court in *First Options*, the two concepts are mutually exclusive. *First Options*, 131 L.Ed.2d at 994-995 (insofar as the Kaplans were forcefully objecting to the arbitrators deciding their dispute with First Options of Chicago, one naturally would think that they did not want the arbitrators to have binding authority over them).

There can be no clear and unmistakable agreement to submit the question of arbitrability to an arbitrator when a party disputes the very existence of an agreement between the parties. Presumably, this is why the Ninth Circuit has held that under

pre-*Deklewa* law,[6/] that the issue of repudiation of a pre-hire agreement is a question of law for a court, rather than an arbitrator, to decide. See *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distributor Co.*, 832 F.2d 507 (9th Cir. 1987) (under pre-*Deklewa* law, when a pre-hire agreement is involved, an employer's claim that it has effectively repudiated the contract containing the agreement to arbitrate is not arbitrable; that question must be decided by a court rather than an arbitrator).

There Are No "Fundamental Policy Differences" Underlying Commercial And Labor Arbitrations Which Justify The Ninth Circuit's Repudiation Of First Options In The Context Of Section 301

In determining that the holding of *First Options* has no applicability in the context of Section 301 actions, the Ninth Circuit cited vague "policy distinctions" between commercial and labor arbitrations. App., *infra*, 12a. The Ninth Circuit failed to consider, much less acknowledge, that the principles of *First Options* were quite literally derived from almost forty years of case law arising under Section 301. Indeed, the holding of *First Options* affirmed the decision of the United States Court of Appeals For The Third Circuit, which relied upon principles articulated in that circuit's own well-developed Section 301

[6/] In *Deklewa v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 3*, 282 N.L.R.B., No. 284, 1986-87 NLRB Dec. (CCH) ¶ 18,549 (Feb. 20, 1987), *enforced sub nom. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), the Board abolished the unilateral repudiation of pre-hire agreements. Pacesetter's unilateral repudiation of the pre-hire agreements occurred in 1975 and 1979, pre-*Deklewa*.

jurisprudence. *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1510 (3rd Cir. 1994), *citing Pennsylvania Power Co. v. Local Union No. 272 of IBEW*, 886 F.2d 46, 50 (3rd Cir. 1989).

Moreover, in reaching its conclusion that policy distinctions preclude *First Options'* applicability, the Ninth Circuit relied upon a comment in the Court's *First Options'* opinion that there was no strong arbitration-related policy favoring First Options of Chicago "in respect to its particular argument here." *First Options*, 131 L.Ed.2d at 995. Based on this isolated comment, the Ninth Circuit found that vast policy distinctions created an unbridgeable gulf between this Court's holding in *First Options* and cases arising under Section 301. The Ninth Circuit concluded that "had the Supreme Court been presented with [this] question the Court would have adopted this circuit's view that a broad arbitration clause grants an arbitrator authority to decide his or her own jurisdiction." App., *infra*, 13a, *citing United Brotherhood of Carpenters and Joiners of America, Local No. 1780 v. Desert Palace, Inc.*, 94 F.3d 1308, 1311 (9th Cir. 1996).

In stating that there was no strong arbitration-related policy in favor of First Options "in respect to its particular argument here," the Court was merely acknowledging that in addressing the threshold question of what the parties have agreed to, there is no policy favoring a presumption that the parties agreed to arbitrate arbitrability. In this respect, the policy considerations present in the commercial and collective bargaining arbitration context are identical.

The Ninth Circuit supported its "fundamentally different" policy rationale by pointing to the contrasting roles of commercial and labor arbitrators in interpreting the parties' substantive agreement. Specifically, the appellate court noted

that while a commercial contract is a "comprehensive distillation" of the parties' bargain, the collective bargaining agreement is a "skeletal, interstitial document." Thus, the labor arbitrator, unlike the commercial arbitrator, is designated by the parties as the person to "fill the gaps" for the vast array of circumstances that have not been considered or reduced to writing. App., *infra*, 12a, *citing Desert Palace* , 94 F.3d at 1311, *quoting Stead Motors v. Automotive Machinists Lodge*, 886 F.2d 1200, 1205 (9th Cir. 1989). The Court of Appeals determined that these perceived differences in the roles of arbitrators rendered inappropriate the wholesale transfer of the rationale of *First Options* to the collective bargaining context. App., *infra*, 12a.

Determining whether a party has agreed to arbitrate the issue of arbitrability is not a matter of "interpreting gaps" or clauses in a contract but is rather a matter of determining whether a contract to arbitrate exists at all. With respect to the issue of arbitrability, the courts have overwhelmingly determined that the governing principles in both the commercial and collective bargaining contexts are identical. In the context of judicial review of both commercial and labor arbitrations, the question of arbitrability is a question of law for the courts to decide. See *e.g.*, *Warrior & Gulf*, 363 U.S. 574; *Virginia Carolina Tools, Inc. v. International Tool*, 984 F.2d 113 (4th Cir.), *cert. den.*, 508 U.S. 960, 113 S.Ct. 2930, 124 L.Ed.2d 681 (1993); *S+L+H S.p.A v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518 (7th Cir. 1993).

In both commercial and labor arbitrations, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies*, 475 U.S. at 648; *Volt Info. Sciences v. Stanford Univ.*, 489 U.S. 468, 478, 103 L.Ed.2d 488, 109 S.Ct. 1248 (1989) (FAA does not require parties to arbitrate

when they have not agreed to do so). Thus, regardless of a labor arbitrator's role in "interpreting gaps" in a collective bargaining agreement, the judiciary's role in determining the question of arbitrability is identical in both the labor and commercial contexts. To conclude otherwise would be to undermine the contractual foundation upon which arbitration rests. See *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994).

In its decision below, the Court of Appeals reasoned that the rationale of *First Options* is inapplicable in Section 301 actions because the policy concerns underlying collective bargaining, unlike the policy concerns underlying commercial disputes, heavily favor arbitration in the labor context. App., *infra*, 13a. In both contexts, however, arbitration is recognized as a preferred means for resolving disputes. See *e.g.*, *Steelworkers v. Enterprise Wheel & Car. Corp.*, 363 U.S. 593, 596, 4 L.Ed.2d 1424, 80 S.Ct. 1358 (1960); *Moses H. Cone Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24-25, 74 L.Ed.2d 765, 103 S.Ct. 927, (1983). Indeed, under both the LMRA and the FAA, the courts give considerable deference to the decisions of arbitrators concerning matters the parties agreed to arbitrate, See *e.g.*, *Steelworkers*, 363 U.S. 564, 567-568, *First Options*, 131 L.Ed.2d at 993.

Undoubtedly, judicial deference to arbitration as a means of resolving a commercial dispute did not always exist. Indeed, when this Court decided *Warrior & Gulf*, it specifically perceived judicial "hostility" toward arbitration of commercial disagreements. With the enactment of the Federal Arbitration Act, however, the judiciary's "'longstanding refusal to enforce agreements to arbitrate,'" was overruled. *Volt Information Sciences v. Stanford Univ.*, 489 U.S. 468, 474, 103 L.Ed.2d 488, 109 S.Ct. 1248 (1989), *citing Dean Witter Reynolds Inc v. Byrd*, 470 U.S. 213, 219-220, 84 L.Ed.2d 158, 105 S.Ct. 1238

(1985). In fact, this Court has repeatedly recognized that the FAA has "declared a national policy favoring arbitration," *Southland Corp. v. Keating*, 465 U.S. 1, 10, 79 L.Ed.2d 1, 104 S.Ct. 852, 858 (1984), and that the Act is motivated first and foremost by a "congressional desire to enforce agreements into which parties had entered." *Volt*, 489 U.S. at 478, citing *Byrd*, 470 U.S. at 220. Thus, since the enactment of the FAA, the *Warrior & Gulf* distinction between the level of judicial deference towards labor and commercial arbitrations -- a distinction upon which the Ninth Circuit so heavily relied in the decision below -- is an anachronism.

In its previous decisions, even the Ninth Circuit has recognized that certain principles underlying labor and commercial arbitrations are identical. For example, in *Three Valleys Mun. Water Dist. v. E.F. Hutton*, 925 F.2d 1136 (9th Cir. 1991), a case involving a commercial dispute arising under the FAA, the Court of Appeals relied on the principles of *AT&T Technologies*, 475 U.S. 643, in holding that plaintiffs, who denied the existence of a valid contract, could not be compelled to arbitrate the threshold issue of arbitrability. The Court of Appeals reasoned that only a court could make that decision. *Id.* at 1140-1141. The Ninth Circuit determined that to rule otherwise would be to undermine the "first principle" of arbitration, i.e., that "a party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit." *Id.* at 1142.

In making this determination, the Ninth Circuit specifically noted that although the "first principle" of arbitration had been established in cases involving labor disputes, it applied "with equal force to arbitrations in non-labor cases arising under the Federal Arbitration Act. *Id.* at 1142, n. 5. See also, *Painewebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996) (after *First Options*, courts may clearly apply appellate

decisions involving labor arbitrations in commercial context); *McCarthy v. Azure*, 22 F.3d 351, 354 (1st Cir. 1994) (applying labor arbitration precedents in a commercial arbitration case). Likewise, as is evident from this Court's reliance upon both commercial and labor arbitration precedents in *First Options*, the holding of that case applies with equal force in both arenas. This is especially true where, as was the case here, the underlying principle is derived from precedent developed in the labor arbitration context, and that principle is merely a logical extension of the ubiquitous "first principle" of arbitration.

This case neither presents a threat to the federal policy favoring the arbitration of disputes arising under collective bargaining agreements, nor infringes upon the arbitrator's role as the parties' agreed-upon contract interpreter. The dispute underlying this case did not involve a question of contract interpretation. It involved the legal question of whether a contract existed between the parties. In *First Options* Justice Breyer addressed this question by simply applying the first and second principles of arbitration:

> [i]f . . . . the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question the parties did not submit to arbitration, namely independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve disputes — but only those disputes — that the parties have agreed to submit to arbitration.

There is no federal labor policy that favors the imposition of a labor contract upon an unwilling party. Moreover, as the Ninth Circuit has recognized, a party's contention that it repudiated a Section 8(f) agreement does not

present a question of contract interpretation to be decided by an arbitrator. Rather, it raises a legal question more appropriately decided by the courts. *Camping Construction v. District Council of Ironworkers*, 915 F.2d 1333, 1338 (9th Cir. 1990), *cert. denied*, 500 U.S. 905 and 500 U.S. 953 (1991).

This Court's reliance, in *First Options*, on almost four decades of precedent developed in the context of Section 301 jurisprudence demonstrates unequivocally that in determining whether a court or an arbitrator will decide the issue of arbitrability, the policies underlying the FAA and the LMRA are not "fundamentally different," the policies are fundamentally identical. Accordingly, Pacesetter respectfully petitions this Court, pursuant to Rule 10.1(a) of the Rules of the Supreme Court of the United States, for a *writ of certiorari* to the United States Court of Appeals for the Ninth Circuit to review the decision below.

C. There Is A Clear Conflict Between The Circuits Regarding The Applicability Of *First Options* To Cases Arising Under Section 301

Pacesetter also petitions this Court for a *writ of certiorari* on the grounds that the decision below is in direct conflict with the decisions of at least three other circuits that have applied *First Options* in disputes arising under Section 301 of the LMRA. See *Braxton v. United States*, 500 U.S. 344, 347, 114 L.Ed.2d 385, 111 S.Ct. 1854 (1991) (the principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among circuit courts of appeals concerning the meaning of important provisions of federal law).

In *Aircraft Braking Systems Corp. v. Local 856*, UAW, 97 F.3d 155 (6th Cir. 1996), *cert. den.* ___ U.S.___, 117 S.Ct.

1311, 137 L.Ed.2d 475 (1997), the Sixth Circuit held that an employer who contested the existence of a collective bargaining agreement between the parties, did not submit the issue of arbitrability to the arbitrator. *Id.* at 160-161. Applying the principles articulated in *First Options*, the Sixth Circuit stated:

> The "arbitrability" dispute at issue here is not a dispute concerning the scope of an arbitration clause in an otherwise valid agreement, but *rather is a dispute as to whether a valid agreement to arbitrate exists at all.* This question traditionally has been answered by the courts. (citations omitted) This question was also the disputed issue in *First Options* and the Supreme Court held that courts should not assume that the parties have agreed to arbitrate the question whether there is a valid agreement to arbitrate without 'clear and unmistakable' evidence that the parties so intended.

Id. at 160, *citing First Options*, 514 U.S. 938, 131 L.Ed.2d 985, 115 S.Ct 1920, 1924 (emphasis added). The Sixth Circuit concluded that the parties in that case had not "clearly and unmistakably" agreed to submit the arbitrability issue to an arbitrator where: (1) a district court had previously ruled in another action that an agreement to arbitrate existed between the same parties; (2) based on the district court's prior decision, the present arbitrator was collaterally estopped from determining the issue; and (3) the party claiming that it had submitted the arbitrability issue to arbitration clearly stated at the outset of the arbitration hearing that it was protesting and that "there can't be a dispute of a violation of an agreement that doesn't exist." *Id.* at 160.

In this case, Pacesetter vigorously asserted at the arbitration hearing that: (1) a previous arbitrator had ruled that

Pacesetter was not bound by a repudiated §8(f) contract; (2) the present arbitrator was collaterally estopped from deciding the issue of arbitrability; and (3) no agreement existed between the parties. App., *infra*, 9a. Had the Ninth Circuit reconsidered its decision in light of the standard articulated in *First Options*, it would have undoubtedly concluded, like the court in *Braxton*, that there was no "clear and unmistakable" evidence of an agreement to submit the issue of arbitrability to the arbitrator. Instead, the Ninth Circuit determined that there was no need to reconsider its decision in light of *First Options* because *First Options* did not apply to cases arising under Section 301.

The Seventh Circuit has also followed and applied *First Options*, without hesitation, in a Section 301 case. *In Local 744, International Brotherhood of Teamsters v. Hinckley & Schmitt, Inc.*, 76 F.3d 162 (7th Cir. 1996), the Court of Appeals held that the district court was required to determine whether a union's grievance was arbitrable -- even if the determination required consideration of the merits of the underlying claim. The Seventh Circuit concluded that under the standard articulated in *First Options*, a court may determine that a party agreed to submit the issue of arbitrability to an arbitrator, only if there was "clear and unmistakable" evidence of such an agreement. *Id.* at 165. The court noted that in the case before it, there was no evidence of submission, much less evidence that was "clear and unmistakable." *Ibid.*; *see also Operative Plasterers v. Intern. Brotherhood of Painters*, 954 F.Supp. 563, 565 (E.D.N.Y.1997) (*First Options* compels this court to determine whether the parties agreed to arbitrate the issue of arbitrability using the "clear and unmistakable" standard).

Finally, in *Excel Corp. v. United Food and Commercial Workers*, 102 F.3d 1464, 1467 (8th Cir. 1996), an action

arising under Section 301, the Eighth Circuit applied without hesitation the principle articulated in *First Options* that a district court order vacating an arbitration award is subject to *de novo* review on questions of law and clearly erroneous review on findings of fact.

Thus, three circuits, without equivocation, have applied *First Options* in actions arising under Section 301. Indeed, even the Ninth Circuit has applied the principles of *First Options* in the labor context, arguably rendering the decision below in direct conflict with the Ninth Circuit's own developing jurisprudence on this issue. Specifically, in *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 631 v. Silver State Disposal Service*, 109 F.3d 1409 (9th Cir. 1997), the Court of Appeals applied *First Options* in determining which standard a court of appeals should apply when reviewing a district court decision that confirms a labor arbitration award. *Id.* at 1410.

The Decision Below Has Widened An Already Existing Split Among The Circuits

The decision below only serves to deepen a confusing split among the circuits which existed prior to *First Options*. For example, prior to *First Options*, the Sixth Circuit was in apparent agreement with the holding of *George Day*. See *e.g.*, *Vic Wertz Distributing v. Teamsters Local 1038*, 898 F.2d 1136, 1138-39 (6th Cir. 1990) (where party opposing arbitrability merely presented evidence and testimony and arbitrator decided question of arbitrability, issue not subject to independent judicial review; *Interstates Brands v. Chauffers, Teamsters Loc. 135*, 909 F.2d 885 (6th Cir. 1990) (by participating in the arbitration proceedings, party implicitly agreed to submit the issue of timeliness, and hence arbitrability, to the arbitrator, thereby waiving the right of independent judicial review). However, the

Sixth Circuit's decision in *Aircraft Braking*, which wholeheartedly embraces the holding of *First Options*, calls into question the continued viability and scope of these decisions.

The Eighth Circuit has traditionally followed *George Day* and its progeny. See *Franklin Electric Co. v. International Union, UAW*, 886 F.2d 188, 192 (8th Cir. 1989) (although record clear that party objected to arbitrator's jurisdiction to decide arbitrability question, party empowered arbitrator to decide question by not expressly preserving issue for initial judicial determination); compare *Excel Corp. v. United Food and Commercial Workers*, 102 F.3d 1464, 1467 (8th Cir. 1996) (in an action arising under Section 301, principle articulated in *First Options* that a district court order vacating an arbitration award is subject to *de novo* review on questions of law and clearly erroneous review on findings of fact found controlling).

In contrast, the Third Circuit's decisions under Section 301 have long adhered to the rule that "[t]he existence and extent of an obligation to settle disputes through arbitration is a contractual matter subject to judicial determination and any claim that the parties intended to exclude the courts from consideration of arbitrability must be borne by 'a clear demonstration of that purpose.'" *Local 719, American Bakery & Confectionery Workers of America, AFL-CIO v. National Biscuit Company*, 378 F.2d 918, 921 (3rd Cir. 1967).

The Third Circuit expanded its *National Biscuit* holding in *Pennsylvania Power Co. v. Local Union No. 272 of IBEW*, 886 F.2d 46 (3rd Cir. 1989). In that case, the employer challenged the arbitrability of a union's grievance but, nevertheless, agreed to submit both the issue of arbitrability and the merits of the grievance to arbitration. The arbitrator, concluding that the grievance was arbitrable, decided the merits

in the union's favor. The district court enforced the award. The Third Circuit reversed.

Addressing the union's argument that by submitting the question of arbitrability to the arbitrator and neglecting to seek a court order staying arbitration, the employer waived its right to judicial review, the Circuit held that "the fact that [Penn Power] argued the merits before the arbitrator will not be construed as a waiver of its right to judicial review on the arbitrability question. *Id.* at 50. For there to be a waiver, the court stated, the party submitting to arbitration must "clearly indicate his willingness to forego judicial review." *Ibid.* Although Penn Power "voluntarily submit[ted]" the arbitrability issue to arbitration, it nonetheless objected to the arbitrability of the issue. Thus, "waiver will not be inferred." *Ibid.*

Finally, the Second Circuit has considered the issue of *who* has primary authority to decide arbitrability to be an issue with implications potentially affecting the judiciary's integrity. Thus, in *Torrington Co. v. Metal Products Workers Union, Local 1685, UAW*, 362 F.2d 677, 680-681, n. 6 (2nd Cir. 1966), the Second Circuit stated that courts cannot be expected to place a stamp of approval upon an arbitrator's action without making some examination of his jurisdiction to act. *Id.* at 680, n.6. Moreover, unlike the Ninth Circuit, the Second Circuit was not troubled by the fact that the arbitrability issue was first submitted to an arbitrator. To the contrary, the Second Circuit has concluded that a more exhaustive judicial review of this question is appropriate after the award has been made than before the award in a suit to compel arbitration. In this way, the court receives the benefit of the arbitrator's interpretative skills as to the matter of his contractual authority. *Id.* at 680-681.

Thus, a party in the Eighth and Ninth Circuits who participates in arbitration and opposes arbitrability -- even if that opposition is grounded in the party's assertion that no agreement

exists between the parties -- is arguably precluded from seeking independent judicial review of the arbitrability question. To preserve the right to a judicial determination, a party in these circuits must take affirmative steps to preserve its rights or else proceed to arbitration at its peril.

In contrast, in the Second and Third Circuits, a party may obtain independent judicial review of an arbitrability question unless that party has clearly demonstrated a contrary intent. Finally, in the Sixth and Seventh Circuits, where the appellate courts have specifically applied the principles articulated by this Court in *First Options* to cases arising under Section 301, it is presumed that parties intended the question of arbitrability to be decided in a judicial forum, unless there is clear and unmistakable evidence of an agreement to the contrary.

This confusion in the standards for determining who has primary authority to resolve arbitrability disputes is antithetical to the federal labor policy favoring the establishment of a uniform body of federal law for the interpretation and enforcement of collective bargaining agreements. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L.Ed.2d 972, 77 S.Ct. 912 (1957). Accordingly, Pacesetter respectfully requests that this Court grant its petition for *writ of certiorari* in order to resolve the conflict in the decisions of the courts of appeals.

CONCLUSION

Pacesetter respectfully submits that the outcome of this case demonstrates why the principles articulated in *First Options* should be applied in all actions involving the question of who should decide arbitrability -- whether arising under the LMRA or the FAA. If the Ninth Circuit's decision is allowed to stand, any party in a Section 301 action who opposes the arbitrability

of a dispute -- even if that opposition is based on a vigorous contention that no agreement exists in the first instance -- will nevertheless find itself bound by an arbitrator's decision regarding jurisdiction and possibly be bound by an agreement to which it is not a party, unless that party has uttered a specific "magical" phrase which preserves the issue for independent judicial review.

As in this case, a party who consistently claims throughout the proceedings that no agreement to arbitrate exists between the parties, will find itself wholly divested of the right to have the issue of arbitral jurisdiction decided independently in a judicial forum, not because that party entered into a clear and unmistakable agreement to arbitrate arbitrability but because that party's argument regarding arbitrability is construed by a court as consent to be bound by an arbitrator's assertion of jurisdiction and a waiver of its rights to independent judicial review. In effect, the decision below allows a court to impose a contract to arbitrate where no contract exists, thereby undermining the consensual nature of arbitration. At the very least, the Ninth Circuit's decision will "too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 131 L.Ed.2d at 994.

Based upon the foregoing arguments and authorities, Pacesetter Construction Company respectfully petitions this court for a *writ of certiorari* to the United States Court of Appeals For The Ninth Circuit to review the decision below. Pacesetter Construction Company further respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further

proceedings consistent with the Court's October 2, 1995 Order in this case, and consistent with the Court's decision in *First Options*.

Respectfully Submitted,

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September, 1997

APPENDIX

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 94-2090

Pacesetter Construction Company, Inc., Petitioner v. Carpenters 46 Northern California Counties Conference Board

October 2, 1995. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of First Options of Chicago, Inc. v. Kaplan, 514 U.S. - - -, 131 L Ed 2d 985, 115 S. Ct. 1920 (1995).

Same case below, 51 F3d 281.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16627
DC No. CV-92-02113-SC

PACESETTER CONSTRUCTION COMPANY, INC.,
Plaintiff-Cross-claimant-Appellant

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES
CONFERENCE BOARD,
Defendant-Counter-claimant-Appellee.

ON REMAND FROM THE
UNITED STATES SUPREME COURT

Filed June 25, 1997

Before: Alfred T. Goodwin, William C. Canby, Jr., and
Thomas G. Nelson, Circuit Judges

Opinion by Judge Canby

SUMMARY

Labor and Employment/Arbitration

On remand from the United States Supreme Court, the court of appeals affirmed a judgment of the district court. The court held that an arbitrator can determine the arbitrability of a dispute between a union and a contractor, when the contractor knowingly and voluntarily submits a contested issue for decision without preserving an objection to the arbitrator's jurisdiction.

In 1980, appellee Carpenters 46 Northern California Counties Conference Board filed a grievance against appellant Pacesetter Construction Company, asserting that by operating as a non-union contractor, Pacesetter was violating provisions of the 46 Northern Counties Master Agreement, a collective bargaining agreement (CBA).

Pacesetter appeared at a hearing before the Board of Adjustment, an arbitration panel, and admitted that it was operating as a non-union contractor. However, Pacesetter contended that it was no longer bound by an agreement with the union because it had repudiated the CBA. The arbitrator denied the grievance.

In 1991, the union filed another grievance against Pacesetter, making allegations similar to those it had submitted to the Board in 1981. Pacesetter appeared, asserting that it was not bound by or party to the CBA, and that both the Board and the union were bound by the res judicata effect of the 1981 ruling. Pacesetter's attorney stated that the Board had jurisdiction because the dispute was based on the 1981

grievance, and expressly disavowed that Pacesetter was making a special appearance. The arbitrator found for the union. In 1992, the Board issued its decision and award upholding the grievance.

The union sought judicial enforcement of the Board's award. Pacesetter cross-claimed for a declaration that it was not bound by the CBA, and petitioned the district court to vacate the 1992 decision and award.

The district court ruled that because Pacesetter did not first present the repudiation issue to the court without submitting to arbitration, it had consented to the jurisdiction of the arbitration panel to determine that issue. The court also held that Pacesetter could not relitigate the issue. Pacesetter appealed.

The court of appeals affirmed. The court held that the Board did not fail to draw its 1992 decision from the CBA when it concluded that despite the 1981 decision, Pacesetter had not repudiated the CBA; that Pacesetter knowingly and voluntarily submitted the repudiation issue to the Board in 1992, and thus consented to have the Board arbitrate that issue; and that the Board accepted jurisdiction over the issue.

On Pacesetter's certiorari petition, the Supreme Court vacated the judgment of the court of appeals and remanded for reconsideration in light of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 1040 (1995).

First Options was a dispute between investors and a company that cleared their trades on the stock exchange. The Court held that by merely arguing the arbitrability issue to an arbitrator, the investors did not indicate a clear willingness to be bound by the arbitrator's decision on that point. The Court

stated that the courts, should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. Noting that there was no strong arbitration-related policy supporting First Options' assertion of a presumption in favor of a party's agreement to be bound by arbitration, the court concluded that no such presumption applied.

On remand from the Supreme Court, Pacesetter contended that it was entitled to summary judgment based on *First Options*.

[1] There was cogent reasons why the principles of *First Options* did not apply in the context of a labor dispute. Collective bargaining agreements involve fundamentally different policy concerns from those applicable to commercial contracts. These distinctions heavily favor arbitration in the labor context. Unlike the commercial contract, which is designed to be a comprehensive distillation of the parties' bargain, the CBA is a skeletal, interstitial document. The labor arbitrator is the person the parties designate to fill in the gaps.

[2] The Supreme Court's observation in the *First Options* that "there is no strong arbitration-related policy" in the commercial arbitration context does not apply in the collective bargaining context, where *there is* a strong federal policy favoring arbitration of labor disputes as embodied in the Labor Management Relations Act.

[3] Pacesetter *was* a party to the agreement. The only questions was whether it effectively had repudiated it. Once the agreement was in effect, all the policy reasons for arbitrating came into play and applied to the contested issue of repudiation. Especially was this so when Pacesetter argued the issue of repudiation to the arbitration.

[4] Pacesetter's posture before the Board left it in a poor position to argue that it never consented to the Board's deciding the issue of arbitrability. Pacesetter did more than simply argue arbitrability. It repeatedly asserted that the Board's jurisdiction stemmed from its original jurisdiction over the 1981 grievance, and that the 1981 decision remained in effect and controlled the 1991 proceeding. It could not be concluded that Pacesetter made clear that it did not want the arbitrator to exercise jurisdiction over its dispute.

[5] Pacesetter appeared before the arbitrator, contested arbitrability and the merits of the dispute, and made no reservation of its right to reserve the issue of arbitrability for initial determination by a court.

[6] *First Options* did not affect the result reached in Pacesetter's original appeal.

COUNSEL

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OPINION

CANBY, Circuit Judge

In its current posture, this case presents the question whether an arbitration panel (the Board of Adjustment) had jurisdiction to determine the arbitrability of a dispute between Pacesetter Construction Co., Inc. ("Pacesetter") and the Carpenters 46 Northern California Counties Conference Board ("Union"). Pacesetter had signed prehire agreements with the Union in 1971 and 1974, at which times it operated as a union contractor. It contends that in 1975 and 1979, it repudiated its prehire agreement and thereafter operated as a nonunion shop. This case arose when the Union filed a grievance in 1991, which the Board of Adjustment upheld. The district court subsequently confirmed the award and Pacesetter appealed. We affirmed the district court's decision in an unpublished memorandum disposition. *Pacesetter Constr. Co. v. Carpenters 46 No. Cal. Counties Conf. Bd.*, No. 93-16627 (9th Cir. Mar.22, 1995).[1/] We held that Pacesetter knowingly and voluntarily submitted to the Board of Adjustment the question whether it had repudiated its Master Agreement with the Union, and thus had consented to have the Board arbitrate that issue. The Supreme Court, however, vacated our decision in a brief order and remanded the matter to us for reconsideration in light of the Court's recent decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 1040, (1995). *Pacesetter Constr. Co. v. Carpenters 46 No. Cal. Counties Conf. Bd.*, 116 S. Ct. 43 (1995). Upon reconsideration, we conclude that *First Options*

[1/] We have attached our memorandum disposition as an appendix to this opinion, after removing the restrictions against citation.

does not change the outcome we reached previously, and we reaffirm our earlier decision.

BACKGROUND

The grievance that led to the award now being litigated was not the first one filed by the Union. In 1980, the Union filed a grievance against Pacesetter asserting that, because it was operating as a non-union contractor, Pacesetter was violating Sections 1 through 51 of the 46 Northern Counties Master Agreement. The Union's grievance was brought before the Board of Adjustment, Arbitrator Koven presiding, in 1981. Pacesetter appeared at the Board of Adjustment hearing, admitted that it was operating as a non-union contractor, and asserted that it was no longer bound by or party to an agreement with the Union. Arbitrator Koven issued a Decision and Award which stated in its entirety: "Having heard all the evidence provided by both sides, and after careful consideration of the matter, the grievance is denied."

During the ten years that followed Koven's decision, Pacesetter continued to act as a non-union contractor. In 1991, the Union filed a second grievance against Pacesetter, making allegations similar to those it had submitted to the Board in 1981, although referring to a later period and different locations. Pacesetter appeared before the Board. As it did in 1981, Pacesetter admitted that it was not abiding by the Agreement, but again asserted that it was not bound by or a party to the Agreement. Pacesetter also argued vigorously that the Board was bound by its prior determination that no contract existed between Pacesetter and the Union, and was required to apply that ruling to the 1991 grievance. The Board disagreed

and, as we have related, issued a Decision and Award in 1992 upholding the Union's grievance.

The Union subsequently sought judicial confirmation of the Board's Award. Pacesetter cross-claimed for a declaration that it was not bound by the Agreement, and petitioned the district court to vacate the 1992 Decision and Award. The district court held that, because Pacesetter did not first present "the repudiation issue to the court without submitting to arbitration," it had consented to the jurisdiction of the arbitration panel to determine the issue of arbitrability. The district court also held that, under previous decisions of this court, Pacesetter could not "relitigate" the arbitrability issue.

Pacesetter appealed to this court. We affirmed the district court's decision, holding, *inter alia*, that: [1] the Board did not fail to draw its 1992 decision from the essence of the Agreement when it concluded that, notwithstanding the 1981 decision, Pacesetter had not repudiated its Agreement with the Union; [2] Pacesetter knowingly and voluntarily submitted the issue of repudiation to the Board in 1992, and thus consented to have the Board arbitrate that issue; and [3] the Board had accepted jurisdiction over the repudiation issue. *Pacesetter Const. Co., Inc. v. Carpenters 46 No. Cal. Counties Conf. Bd.*, No. 93-16627, at 2-4 (9th Cir. Mar. 22, 1995).

Pacesetter then filed the petition for certiorari that resulted in the Supreme Court's vacating our decision and remanding the case to us for reconsideration of our decision in light of *First Options*.

ANALYSIS

First Options involved a dispute between investors and First Options, a company that cleared their trades on the stock exchange. The investors were the Kaplans and Mr. Kaplan's wholly-owned investment corporation. Only the corporation had signed an arbitration agreement. When First Options submitted the entire dispute to arbitration, the Kaplans appeared individually before the arbitration panel and objected to its jurisdiction, contending that their dispute was not arbitrable. First Options argued that the Kaplans had implicitly consented to the jurisdiction if the arbitration panel by arguing the issue of arbitrability to it.

The Supreme Court rejected *First Options'* argument, stating that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *First Options*, 115 S. Ct. at 1924 (quoting *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649 (1986)). The Kaplans did not so consent, held the Court:

> [M]erely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, *i.e.*, a willingness to be effectively bound by the arbitrator's decision on that point. To the contrary, insofar as the Kaplans were forcefully objecting to the arbitrators deciding their dispute with First Options, one naturally would think that they did *not* want the arbitrators to have binding authority over them.

Id. at 1925. Moreover, the Kaplans' appearance before the arbitration panel could be explained by the need to represent Mr. Kaplan's wholly owned subsidiary, which had agreed to arbitrate. *Id.*

The Supreme Court also rejected the argument of First Options that there was a presumption in favor of a party's agreement to be bound by arbitration.

> [T]here is no strong arbitration-related policy favoring First Options in respect to [that] particular argument here. After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, . . . but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms.

Id. (internal quotations and citations omitted).

Pacesetter would now have us simply apply *First Options* and direct summary judgment in its favor. It argues that *First Options* invalidates our earlier ruling that "[b]ecause Pacesetter submitted the repudiation [issue] to the Board without objecting to the Board's jurisdiction over the issue, it implied its consent to the Board's deciding whether it repudiated the Agreement."

[1] We reject Pacesetter's argument. Our court has recently held that it is not appropriate to transfer wholesale the rationale of *First Options* to the collective bargaining context. *United Brotherhood of Carpenters and Joiners of America, Local No. 1780 v. Desert Palace, Inc.*, 94 F.3d 1308, 1311-12 (9th Cir. 1996). In *Desert Palace*, we held that a common "broad arbitration clause" providing for arbitration of "all disputes 'regarding the interpretation or application'" of a collective bargaining agreement represented an agreement to permit the arbitrator to decide arbitrability. *Id.* at 1310. We rejected the argument that *First Options* required a contrary result. There were cogent reasons, we said, why the principles of *First Options* did not apply in the context of a labor dispute. First,

we noted that collective bargaining agreements involve fundamentally different policy concerns from those applicable to commercial contracts, and these distinctions heavily favor arbitration in the labor context:

> Unlike the commercial contract, which is designed to be a comprehensive distillation of the parties' bargain, the collective bargaining agreement is a skeletal, interstitial document. . . . The labor arbitrator is the person the parties designate to fill in the gaps; for the vast array of circumstances they have not considered or reduced to writing, the arbitrator will state the parties' bargain. He is the "the parties' officially designated 'reader' of the contract . . . their joint alter ego for the purpose of striking whatever supplementary bargain is necessary" to handle matters omitted from the agreement.

Desert Palace, 94 F.3d at 1311 (emphasis removed) quoting *Stead Motors v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1205 (9th Cir. 1989) (en banc), cert, denied, 495 U.S. 946 (1990)).

[2] We also pointed out that the Supreme Court's observation in *First Options* that "there is no strong arbitration-related policy" in the commercial-arbitration context does not apply in the collective-bargaining context, "where *there is* a strong federal policy favoring arbitration of labor disputes as embodied in the Labor Management Relations Act." *Id.* at 1312. We therefore concluded that "had the Supreme Court been presented with [the] question the Court would have adopted this circuit's view that a broad arbitration clause grants an arbitrator authority to decide his or own jurisdiction." *Id.* at 1311.

Pacesetter does not contend that the arbitration clause in the Agreement with the Union is any less broad than that in

Desert Palace. Pacesetter argues, however, that this fact is irrelevant because it is not a party to the Agreement and its arbitration clause.

[3] Pacesetter *was* a party to the Agreement, however. The only question is whether it effectively had repudiated it. Once the Agreement was in effect, all of *Desert Palace's* policy reasons for arbitrating disputes between the parties to labor disputes came into play, and applied as well to the contested issue of repudiation. Especially was this so when Pacesetter argued the issue of repudiation to the arbitrator. We held in *George Day Constr. Co. v. United Brotherhood of Carpenters*, 722 F.2d 1471, 1475 (9th Cir. 1984), that an employer who arbitrated the issue of arbitrability under an expired collective bargaining contract, without reserving the question of arbitrability for initial decision by a court, consented to the jurisdiction of the arbitrator. Because of the policy consideration set forth in *Desert Palace* and discussed above, we conclude that *George Day* survives *First Options* and controls this case.

[4] A second reason for rejecting Pacesetter's argument is that its posture before the Board of Adjustment leaves it in a poor position to argue that it never consented to the Board's deciding the issue of arbitrability. In disposing of Pacesetter's original appeal, we stated that Pacesetter consented to the Board's jurisdiction simply by arguing the issue of arbitrability to it without preserving its objection to jurisdiction. In so stating, we were relying on *George Day*, *supra*, and needed to say no more. In fact, however, Pacesetter did more than simply argue arbitrability. It repeatedly asserted that the Board's jurisdiction stemmed from its original jurisdiction over the 1981 grievance, and that the 1981 decision of the Board remained in effect and controlled the 1991 proceeding. Pacesetter's counsel engaged in the following colloquy with the arbitrator:

> MR. SCHAEFER: [W]e're appearing here because we believe you already had jurisdiction of this '81 grievance. That's why we didn't say there's no jurisdiction, go to court, et cetera. There's been a previous decision, and we're saying that was decided and it's final and it's binding on the panel. And it's binding on this local union.
>
> [Arbitrator]: In effect what you're -- can I characterize your motion that you've just made, the last one, as being a special appearance then at this point?
>
> MR. SCHAEFER: Well, we're not certain a special appearance is proper because the panel already has jurisdiction over Pacesetter Construction by virtue of an arbitration that occurred under the very document that the union claims creates a contract, namely the '74 document, '74 me too agreement. And there's an arbitral award on that. So that if we appeared here, we can't specially appear now when that proceeding is res judicata on this panel and this union.

In light of this exchange, we cannot conclude that Pacesetter made clear (as the Kaplans did in *First Options*) that it did not want the arbitrator to exercise jurisdiction over its dispute.

[5] Our conclusion that the Board of Adjustment had authority to decide the arbitrability of Pacesetter's dispute is not inconsistent with our recent decision in *Carpenters 46 No. Cal. Counties Conf. Bd. v. Zcon Builders*, 96 F.3d 410 (9th Cir. 1996). In *Zcon*, an arbitrator had held that a corporation's dispute with a union was arbitrable because the corporation was the alter ego of an employer that had signed an arbitration agreement. We held that the corporation, which denied that it was a party to the collective bargaining agreement, was not

bound by the arbitrator's decision of arbitrability. *Id.* at 414-16. Our decision, however, was based on the fact that the objecting corporation had never appeared at the arbitration, and consequently never evinced its intent to allow the arbitrator to decide arbitrability, within the meaning of *George Day*. *Id.* at 415-16. Pacesetter, in contrast, appeared before the arbitrator, contested arbitrability and the merits of the dispute, and made no reservation of its right to reserve the issue of arbitrability for initial determination by a court. *George Day*, and not *Zcon*, governs Pacesetter's case.

CONCLUSION

[6] *First Options* does not effect the result we reached in Pacesetter's original appeal. The judgment of the district court confirming the award of the Board of Adjustment in favor of the Union is therefore

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16627
DC No. CV-92-02113-SC

PACESETTER CONSTRUCTION COMPANY, INC.,
Plaintiff-Cross-claimant-Appellant

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,
Defendant-Counter-claimant-Appellee.

Appeal from the United States District Court for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted March 13, 1995
San Francisco, California
Filed March 22, 1995

MEMORANDUM[1/]

Before: GOODWIN, CANBY, and T. G. NELSON, Circuit Judges

I.

Pacesetter Construction Company, Inc., appeals the district court's confirmation of the Carpenters Board of Adjustment's Decision and Award in favor of Carpenters Local Union No. 316. We affirm the district court's confirmation of the Decision and Award.

II.

It was appropriate for the Board to decide whether the 1981 Decision precluded it from finding that Pacesetter was bound by the Carpenters 46 Northern California Master Agreement ("Agreement"). *Local Union No. 370 v. Morrison-Knudsen Co.*, 786 F.2d 1356, 1358 (9th Cir. 1986). As long as the Board's 1992 Decision and Award drew its essence from the Agreement, the district court was constrained to enforce it even if the Board erred in its factual determination of what the 1981 Decision necessarily decided. *Phoenix Newspapers Inc. v. Phoenix Mailers Union Local 752*, 989 F.2d 1077, 1080 (9th Cir. 1993) (under most circumstances, a reviewing court is bound to defer to the arbitrator's decision even if the arbitrator finds facts erroneously). Pacesetter has not set forth specific

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[1/] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

facts showing that the Board's determination concerning the 1981 Decision created a genuine issue as to whether the 1992 Decision and Award draws its essence from the Agreement. The district court therefore was not required to reject the 1992 Decision because of the 1981 Decision.

III.

Pacesetter has presented no evidence that Carpenters committed fraud when it represented that it could not divine the meaning of the 1981 Decision. It also has presented no evidence that Arbitrator Koven must have based his decision on repudiation. Therefore, we will not reverse the district court's confirmation of the Decision and Award on the ground that it was procured through fraud.

IV.

Pacesetter knowingly and voluntarily submitted the issue of repudiation to the Board in 1992. After the Board announced that it would consider on the merits whether Pacesetter was bound by the Agreement, thereby notifying Pacesetter that the 1992 proceeding was not a continuation of the 1981 proceeding, Pacesetter submitted the repudiation issue to the Board. Pacesetter did not preserve the question of whether the Board had jurisdiction over the repudiation issue by objecting to the Board's authority to decide the repudiation issue. *Cf. Van Waters & Rogers, Inc. v. International Brotherhood of Teamsters*, 913 F.2d 736, 740 (9th Cir. 1990) (describing ways in which party to arbitration can preserve an issue for judicial determination). Because Pacesetter submitted the repudiation to the Board without objecting to the Board's jurisdiction over the issue, it implied its consent to have the Board decide whether it repudiated the Agreement. *George Day Const. Co. v. United*

Brotherhood of Carpenters & Joiners, 722 F.2d 1471 (9th Cir. 1984).

V.

We also agree with the district court's determination that the Board accepted jurisdiction over the repudiation issue. In its Decision, the Board indicated that it would accept jurisdiction over the case, including the issue of whether Pacesetter had repudiated the Agreement, because there was no timely letter of termination. The Board then rejected Pacesetter's repudiation argument on the ground that Pacesetter had not presented evidence of a letter of repudiation on behalf of Pacesetter. The Board mentioned *Deklewa* standards, but it did not suggest that its reason for rejecting Pacesetter's repudiation argument was that Pacesetter had acted unilaterally. Therefore, the Board did not act in manifest disregard for the law in rejecting Pacesetter's argument that it had repudiated the Agreement.

VI.

Finally, we hold that Carpenters is entitled to attorneys' fees under the terms of the Agreement.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. CV-92-2113-SC

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,
Petitioner,

v.

PACESETTER CONSTRUCTION CO., INC.,
Respondent.

AND RELATED CROSS-ACTION

ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT AND MOTION FOR CONFIRMATION OF ARBITRATION AWARD

Filed August 13, 1993

I. INTRODUCTION

Carpenters 46 Northern California Counties Conference Board ("Carpenters") is a union that filed a grievance against Pacesetter Construction Co., Inc. ("Pacesetter") for alleged violation of a collective bargaining agreement. Following an arbitration award in favor of Carpenters, Carpenters seeks

confirmation of the award from the court. Pacesetter opposes confirmation of the award and has filed a cross-petition for declaratory relief that it is not bound by the terms of the collective bargaining agreement.

In the pending motions, Carpenters seeks summary judgment and confirmation of the arbitration award. Pacesetter seeks summary judgment of its declaratory relief action that it is not bound by the collective bargaining agreement.

II. FACTS

On June 16, 1974, Pacesetter and Carpenters entered into a memorandum agreement in which Pacesetters agreed to be bound by the Carpenters 46 Northern California Counties Master Agreement dated June 16, 1974 ("master agreement") subject to future modifications, changes, extensions or renewals.

In 1976, Pacesetter went out of business due to business losses. The California Department of Consumer Affairs revoked Pacesetter's contractor's license effective July 1, 1976. Pacesetter resumed operation in 1979. On August 8, 1979, the Department of Consumer Affairs reactivated Pacesetter's contractor's license. On October 7, 1980, the Delta-Yosemite District Council local affiliate of Carpenters filed a grievance accusing Pacesetter of violating the master collective bargaining agreement by using non-union labor.

Arbitrator Adolph M. Koven heard the grievance on May 13, 1981 and issued his decision May 20, 1981. The decision stated, "Having heard all of the evidence provided by both sides, and after careful consideration of the matter, the grievance is denied." No transcript of the hearing exists and

Arbitrator Koven, now deceased, did not make any findings of fact.

The 1974-77 master agreement was modified, renewed and supplemented in the years leading up to the 1988-1993 master agreement. Section 51 of the 1988-1993 master agreement provides a grievance procedure for application and interpretation of the master agreement itself. Section 51(5)(d)(e) provides for arbitration of disputes and Section 51(13) provides for confirmation awards in both state and federal court.

On June 25, 1991, Carpenters filed a grievance charging Pacesetter violated the of *[sic]* the 1988-1993 master agreement by using non-union employees. Pacesetter submitted to arbitration and raised the following issues: (1) possible preclusive effect of the 1981 arbitration ruling; (2) termination of the collective bargaining agreement prior to the grievance; and (3) repudiation of the collective bargaining agreement prior to the grievance.

On March 11, 1992, the Board of Adjustment issued is decision in favor of Carpenters. Carpenters now seeks confirmation of the decision and Pacesetter seeks denial of confirmation of the Award and declaratory relief that it is not bound by the 1988-1993 master agreement.

III. DISCUSSION

Summary judgment is proper only when there is no genuine issue of material fact and, when viewing the evidence

in the light most favorable to the non-moving party,[1/] the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); *Jung v. FMC Corp.*, 755 F. 2d 708, 710 (9th Cir. 1985). Once a summary judgment motion is made and properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Myrtle Nell Catrett*, 477 U.S. 317 (1986). In addition, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

The facts in this action are for the most part undisputed. However, Pacesetter raises several legal challenges to confirmation of the arbitration award. Pacesetter contends: (1) The Board of Adjustment acted in manifest disregard of the law in failing to grant preclusive effect to the 1981 arbitration Decision and Award; (2) Pacesetter repudiated the collective bargaining agreement; (3) Pacesetter terminated the collective bargaining agreement; and (4) The Board of Adjustment did not accept jurisdiction to determine the repudiation and termination issues in granting the Award to Carpenters.

Pacesetter contends the Board of Arbitration acted in manifest disregard of the law by failing to grant preclusive effect, either res judicata or collateral estoppel, to the 1981 denial of grievance by arbitrator Koven. After a contested hearing in 1981, Koven issued a decision which stated, "Having

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[1/] *Bryant v. U.S. Treasury Dept., Secret Service*, 903 F.2d 717, 720 (9th Cir. 1990).

heard all of the evidence provided by both sides, and after careful consideration of the matter, the grievance is denied." No transcript of the hearing exists and Koven made no findings of fact. Pacesetter maintains Koven must have found that no collective bargaining agreement existed and that the Board of Adjustment was bound by that alleged determination.

Pacesetter's reliance on the 1981 decision is misplaced. Without findings of fact or a transcript of the proceeding, the Board of Adjustment could not have determined arbitrator Koven's reasoning without lapsing into speculation. Contrary to Pacesetter's contentions, there could be other reasons for denial of a grievance beside *[sic]* the lack of a binding collective bargaining agreement.[2/]

The Board of Adjustment could not be certain of identity of issues litigated, or that the issue of existence of a collective bargaining agreement was actually litigated by the parties. In the absence of a complete record of the earlier arbitration, the Board of Adjustment properly declined to grant the 1981 decision preclusive effect as to the existence of a binding collective bargaining agreement. It certainly did not act with the manifest disregard of the law necessary to prevent confirmation of the 1991 decision. See *American Postal Workers v. U.S. Postal Service*, 682 F.2d 1280 (9th Cir. 1982).

Pacesetter claims the Board of Adjustment's decision should not be confirmed since it does not "draw its essence from

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[2/] For example, arbitrator Koven could have found that despite a binding collective bargaining agreement, Pacesetter's actions did not warrant an Award. Similarly, Koven could have determined there was insufficient evidence provided to prove violation of the collective bargaining agreement.

the collective bargaining agreement." See *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Pacesetter maintains that the questions of repudiation and termination of the contract were not for the arbitrator to decide.

The touchstone for determining the role of the arbitrator and court in the Ninth Circuit is *Camping Construction v. District Council of Iron Workers*, 915 F.2d 1333 (9th Cir. 1990), *cert. den.*, 111 S.Ct. 1684 (1991) and 111 S.Ct. 2260 (1991). In *Camping Construction*, the district court granted a stay of arbitration to rule on the proper scope of pending arbitration of pre-1987 claims. After the district court determined that both repudiation and termination issues were proper for arbitration, the arbitration was further stayed for review by the Ninth Circuit. The Court of Appeals held that while pre-1987 termination was in fact a proper subject of arbitration, because of a narrow exception "the question of repudiation was for the court rather that *[sic]* the arbitrator to decide." *Id.* at 1339.

Thus, as demonstrated by *Camping Construction*, Pacesetter's claim that the termination issue was not subject to arbitration lacks merit. "The dispute over termination is, as the district court held, arbitrable under the agreement here." *Id.*

The question of whether the Board of Adjustment decision should be confirmed without judicial determination of repudiation of a pre-hire agreement is more difficult. Had Pacesetter presented the repudiation issue to the court without submitting to arbitration and invoking the Board of Adjustment to rule on repudiation, the holdings in *Camping Construction* and *IBEW, Local 441 v. KBR Electric*, 812 F.2d 495 (9th Cir.

1987) would lead the court to withhold confirmation of the decision pending court determination of repudiation.

However, neither *Camping Construction* nor *KBR Electric* provide guidance as to whether a party can willingly submit to arbitration that includes the issue of repudiation, present evidence of repudiation, argue for repudiation and then raise the issue of arbitrability following an adverse ruling. In *Camping Construction*, arbitration was stayed pending determination by the Ninth Circuit. *Camping Construction*, 915 F.2d at 1336. In *KBR Electric*, the employer refused to participate in arbitration and instead presented evidence of repudiation to the district court on motion for summary judgment. *KBR Electric*, 812 F.2d at 497.

In contrast, Pacesetter did not attempt to preserve the issue of repudiation for the court. The transcript of the Board of Adjustment hearing reveals Pacesetter consented to the jurisdiction of the Board of Adjustment. Transcript of Grievance Proceedings at pp. 31, 32. Pacesetter specifically raised the issue of repudiation. "By way of argument, in addition to the arguments on the evidence that was presented before, we would submit that any agreement that emanated form *[sic]* the 1974 agreement was repudiated by the acts of Pacesetter . . ." Transcript at p. 36. In fact, Pacesetter's pending motion for summary judgment states, "*Second, the Board of Adjustment ignored the evidence of repudiation presented by Pacesetter.*" Pacesetter Memorandum of Points and Authorities in Support of Motion for Summary Judgment, p. 17 (emphasis supplied).

In essence, Pacesetter seeks to challenge the jurisdiction of arbitrator and relitigate the repudiation issue before the Court. The Ninth Circuit has consistently rejected this

approach. In *George Day Const. v. United Broth. of Carpenters*, 722 F.2d 1471 (9th Cir. 1984), the court held that having submitted an entire controversy to an arbitrator without reserving the issue of arbitrability, "the employer impliedly consented to the arbitrator's deciding both the question of arbitrability and the merits of the controversy." *Id.* at 1475.

Previously, in *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 657 (9th Cir. 1964), the court held, "[A] claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrator to act." *Id.* at 657. See *Orion Pictures v. Writers Guild of America*, 946 F.2d 722, 725 (9th Cir. 1991).

Allowing Pacesetter to voluntarily submit the repudiation issue to the Board of Adjustment and then question the authority of the Board to act would contravene Ninth Circuit authority and undermine confidence in the finality of arbitration.

Finally, Pacesetter argues that the Board of Adjustment never took jurisdiction over the termination and repudiation issues. This contention is belied by the discussion in the Board of Adjustment decision. The Board specifically discussed the evidence presented and the fact that it based its jurisdiction of *[sic]* evidence of a signed agreement. The Board also relied on the lack of a letter of termination and the fact, "In the case of Pacesetter there is no clear letter of [sic] consistent with the *Dekelwa [sic]* requirements. While there is a letter of repudiation for Gary Johnson there is no letter of repudiation for Pacesetter." See Board of Adjustment, decision at p. 3.

Having considered each of Pacesetter's objections to confirmation of the decision, the court turns to the standard for review of arbitration awards in the Ninth Circuit set forth in

Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1207-1209 (9th Cir. 1989).

> Judicial scrutiny of an arbitrator's decision is extremely limited. The arbitrator's factual determinations and legal conclusions generally receive deferential review as long as they derive their essence from [the collective bargaining agreement]. If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced. This remains so even if the basis for the arbitrator's decision is ambiguous and notwithstanding the erroneousness of any factual findings or legal conclusions.

Id. at 1209.

Here, the Board of Adjustment Decision and Award drew their essence from the collective bargaining agreement. The record reveals the Board reviewed the agreement itself as well as evidence and argument from both parties. Since the decision does not appear implausible or improper, it shall be confirmed as the judgment of the court.

Having confirmed of the Board of Adjustment's decision that Pacesetter is bound by the terms of the collective bargaining agreement and for the reasons set forth above, the court denies Pacesetter's motion for summary judgment.

IV. CONCLUSION

In accordance with the foregoing, it is hereby ORDERED that:

The arbitration award issued by the Board of Adjustment on March 11, 1992, is CONFIRMED, and Respondent is hereby ORDERED to comply with the decision of the Board of Adjustment.

Petitioner's request for attorney's fees reasonably incurred in bringing this action is GRANTED.

The summary judgment of respondent and cross-petitioner Pacesetter is DENIED.

IT IS SO ORDERED.

DATED: August 12, 1993

Signed by Samuel Conti
United States District Judge

SECTION 8(f)
NATIONAL LABOR RELATIONS ACT
29 U.S.C. §158(f)

Chapter 7 — Labor Management Relations
Subchapter II — National Labor Relations

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§158. Unfair labor practices

(f) Agreements covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such

agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(July 5, 1935, c. 372, §8, 49 Stat. 452; June 23, 1947, c. 120, Title I, §101, 61 Stat. 140; Oct. 22, 1951, c. 534, §1(b), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86-257, Title II, §201(e), Title VII, §§704(a)-(c), 705 (a), 73 Stat. 525, 542, 545.)

SECTION 301
LABOR MANAGEMENT RELATIONS ACT OF 1947
29 U.S.C. §185

Chapter 7 — Labor-Management Relations
Subchapter IV — Liabilities of and Restrictions on Labor and Management

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§185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only

against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, c. 120, Title III, §301, 61 Stat.156.) SECTION 301

SECTION NINE
FEDERAL ARBITRATION ACT
9 U.S.C. §9

Title 9 -- Arbitration

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§9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court, shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award, is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party of his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district

within which the adverse party may be found in like manner as other process of the court.

July 30, 1947, c. 392, 61 Stat. 672.

(2)

Supreme Court, U.S.
FILED
NOV 7 1997
CLERK

No. 97-532

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

PACESETTER CONSTRUCTION COMPANY, INC.,
Petitioner,
v.
CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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November 7, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

33 pp

QUESTIONS PRESENTED

1. Whether this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L.Ed.2d 985, 115 S.Ct. 1920 (1995), is in direct conflict with the decision of the Ninth Circuit in this case which held that *First Options* does not apply to disputes arising under section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), as amended.

2. Whether the decision of the Ninth Circuit in this case creates a conflict among the circuits regarding the applicability of *First Options* to cases arising under section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), as amended.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
I. THE NINTH CIRCUIT'S OPINION BELOW IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *FIRST OPTIONS*	4
A. There Is No Conflict Because Pacesetter Expressly Consented To The Arbitrator's Jurisdiction	4
B. There Is No Conflict Because *First Options* Is A Commercial Arbitration Case Decided Under The Federal Arbitration Act	7
1. Fundamental Differences Between Labor And Commercial Arbitration Require That *First Options* Should Not Apply To Labor Arbitration	7
2. *First Options* Must Not Apply To Labor Arbitration Because It Is Inconsistent With Federal Labor Policy	15
C. There Is No Conflict Because The Implied Consent Doctrine Is Consistent With *First Options*	16
II. THERE IS NO SPLIT AMONG THE CIRCUITS OVER THE APPLICATION OF *FIRST OPTIONS* TO CASES ARISING UNDER SECTION 301 OF THE LMRA	18
III. THERE IS NO SPLIT AMONG THE CIRCUITS REGARDING WHO HAS THE PRIMARY AUTHORITY TO DECIDE ARBITRABILITY	23
CONCLUSION	27

TABLE OF AUTHORITIES

CASES — Page

Abram Landau Real Estate and Woodland Realty Co. v. Gus Benova, 123 F.3d 69 (2nd Cir. 1997).. 21, 22
Aircraft Braking Systems Corp. v. Local 856, UAW, 97 F.3d 155 (6th Cir. 1996), *cert. den.*, —— U.S. ——, 137 L.Ed.2d 475, 117 S.Ct. 1311 (1997) 19, 20, 25
Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974) 12
American Postal Workers Union v. U.S. Postal Service, 823 F.2d 466 (11th Cir. 1987) 12
AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 89 L.Ed.2d 648, 106 S.Ct. 1415 (1986) ..... *passim*
Excel Corp. v. United Food & Commercial Workers, 102 F.3d 1464 (8th Cir. 1996) 21
Ficek v. Southern Pacific Co., 338 F.2d 655 (9th Cir. 1964) 16, 24
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 131 L.Ed.2d 985, 115 S.Ct. 1920 (1995) ..... *passim*
Franklin Electric Co. v. International Union, UAW, 886 F.2d 188 (8th Cir. 1989) 24
Gateway Coal Company v. United Mineworkers of America, 414 U.S. 368, 38 L.Ed.2d 583, 94 S.Ct. 629 (1974) 9
George Day Construction Company v. United Brotherhood of Carpenters, 722 F.2d 1471 (9th Cir. 1984) ..... *passim*
Gilmer v. Interstate/Johnson Lane, 500 U.S. 20, 114 L.Ed.2d 26, 111 S.Ct. 1647 (1991) 12
Glass Molders, Pottery, Plastic and Allied Workers, International Union, Local 182B v. Excelsior Foundry Co., 56 F.3d 844 (8th Cir. 1995) 11
Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997) 11, 12
Harry Hoffman Printing, Inc. v. Graphic Communications International Union, Local 261, 950 F.2d 95 (2nd Cir. 1991) 11

TABLE OF AUTHORITIES—Continued

Page

International Ass'n of Machinists and Aerospace Workers, Lodge No. 1777 v. Fansteel, Inc., 900 F.2d 1005 (7th Cir. 1990), *cert. denied*, 498 U.S. 851 (1990) 25

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 631 v. Silver State Disposal Service, 109 F.3d 1409 (9th Cir. 1997) 21

International Brotherhood of Teamsters, Local 117 v. Washington Employers, Inc., 557 F.2d 1345 (9th Cir. 1977) 16, 24

Interstate Brands v. Chauffeurs, Teamsters Local 135, 909 F.2d 885 (6th Cir. 1990) 24

Jones Dairy Farm v. Local No. P-1236 UFCW Int'l Union, 670 F.2d 173 (7th Cir. 1985) 25

Local 744, International Brotherhood of Teamsters v. Hinckley and Schmitt, Inc., 76 F.3d 162 (7th Cir. 1996) 21, 25

Mago v. Shearson Lehman Hutton Inc., 956 F.2d 932 (9th Cir. 1992) 12

McCarthy v. Azure, 22 F.3d 351 (1st Cir. 1994) 14

Pacesetter Construction Company, Inc. v. Carpenters 46 Northern California Counties Conference Board, 116 F.3d 436 (9th Cir. 1997) ..... *passim*

Painewebber Inc. v. Elahi, 87 F.3d 589 (1st Cir. 1996) 14

Pennsylvania Power Co. v. Local Union No. 272 of IBEW, 886 F.2d 46 (3rd Cir. 1989) 24

San Diego County Dist. Council v. Cory, 685 F.2d 1137 (9th Cir. 1982) 11

Stead Motors v. Automotive Machinists Lodge 1173, 886 F.2d 1200 (9th Cir. 1989) 8, 9, 10

Sterling Colorado Beef Co. v. United Food & Commercial Workers, Local Union No. 7, 767 F.2d 718 (10th Cir. 1985) 11

Syufy Enterprises v. Northern California State Ass'n of IATSE Locals, 631 F.2d 124 (9th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981) 24

TABLE OF AUTHORITIES—Continued

Page

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 1 L.Ed.2d 972, 77 S.Ct. 912 (1957) 8

Three Valleys Mun. Water Dist. v. E.F. Hutton, 925 F.2d 1136 (9th Cir. 1991) 14

Torrington Co. v. Metal Products Workers Union, Local 1685, UAW, 362 F.2d 677 (2nd Cir. 1966) .. 26

United Brotherhood of Carpenters and Joiners of America, Local No. 1780 v. Desert Palace, 94 F.3d 1308 (9th Cir. 1996) 10, 11, 18, 19, 22

United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 98 L.Ed.2d 286, 108 S.Ct. 364 (1987) 11

United Steelworkers v. American Manufacturing Co., 363 U.S. 564, 4 L.Ed.2d 1403, 80 S.Ct. 1343 (1960) 8

United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 4 L.Ed.2d 1424, 80 S.Ct. 1347 (1960) 8, 10

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 4 L.Ed.2d 1409, 80 S.Ct. 1347 (1960) 7, 8, 9, 13

Vic Wertz Distributing v. Teamsters Local 1038, 898 F.2d 1136 (6th Cir. 1990) 24

STATUTES

Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) ..... *passim*

IN THE

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OCTOBER TERM, 1997

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v.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Pacesetter Construction Company, Inc. ("Pacesetter") has not presented any new issue or matter of importance for this Court to consider. There are no conflicts between the Ninth Circuit and this Court, nor any conflicts among the circuits, that should occupy the scarce resources and time of the Supreme Court. In *Pacesetter Construction Company, Inc. v. Carpenters 46 Northern California Counties Conference Board*, 116 F.3d 436 (9th Cir. 1997) the Ninth Circuit was correct in ruling that *First Options* should not apply to labor arbitration, thus re-confirming the arbitral award, and its decision must be upheld.

Pacesetter has blatantly misled this Court in its Petition as well as the courts below by asserting that it "repeatedly objected to the arbitrability of the Union's grievance on the ground that it was not a party to the contract with the Union." (Petitioner's Statement of the Case at pg. 4). This claim directly contradicts the statements made by Pacesetter at the Board of Adjustment hearing and has been repeatedly rejected by both the District Court and the Circuit Court. There can be no question that Pacesetter recognized the jurisdiction of the Board of Adjustment ("Board" or "Arbitrator") and fully participated in the proceedings, including the presentation of evidence and argument. The undisputable facts established that Pacesetter clearly and unmistakably agreed to submit the dispute to the Arbitrator. Thus, the requirements of *First Options* are met. Therefore, even if it is determined that *First Options* applies to labor arbitration, Pacesetter is still bound to the Arbitrator's decision on arbitrability and the award must be confirmed.

While the facts of the case do not embrace a conflict, the legal principles also do not conflict with this Court's decision in *First Options*. Relying, in part, on the implied consent doctrine set forth in *George Day Construction Company v. United Brotherhood of Carpenters*, 722 F.2d 1471 (9th Cir. 1984), the Ninth Circuit held that Pacesetter had consented to the Arbitrator's authority to decide the issue of arbitrability and therefore waived its right to court review of the arbitrability issue. The implied consent doctrine of *George Day* does not conflict with *First Options* and is consistent with the *Steelworkers Trilogy* and *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 89 L.Ed.2d 648, 106 S.Ct. 1415 (1986). Based on the special nature and purpose of labor arbitration, *Pacesetter* and *George Day* further define what constitutes clear and unmistakable evidence of an agreement to submit the issue of arbitrability to the arbitrator for determination. These Ninth Circuit decisions are also consistent with the other circuits that have addressed the issue.

Moreover, *First Options* should not impact the Ninth Circuit's decision below because *First Options* is a commercial arbitration case. Due to the fundamental differences between labor and commercial arbitration, commercial arbitration law should not be applied to labor arbitration cases if inconsistent with federal labor policy. Such a result is mandated by thirty years of Supreme Court and Federal Court of Appeals precedent. If *First Option* is applied to reverse the holding of the Ninth Circuit, the effectiveness of labor arbitration as a substitute for industrial strife will be severely weakened. Therefore, the Ninth Circuit's decision below does not conflict with *First Options*.

Finally, the Ninth Circuit held that *First Options* does not apply to cases that arise under section 301 of the Labor Management Relations Act. Since the Ninth Circuit is the only circuit to address or even reach this issue, there is not a conflict in the circuits regarding the applicability of *First Options* to the collective bargaining context.

REASONS FOR DENYING THE WRIT

Respondent Carpenters 46 Northern California Counties Conference Board ("Union") respectfully requests that this Court deny the Petition for Writ of Certiorari. The decision below is not in conflict with *First Options* or any other decision of any other circuit. Because Pacesetter expressly consented to the jurisdiction of the Board of Adjustment, it waived its right to independent judicial review of the arbitrability issue. The Ninth Circuit was therefore correct in affirming the judgment of the District Court confirming the arbitration award.

I. THE NINTH CIRCUIT'S OPINION BELOW IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *FIRST OPTIONS*.

A. There Is No Conflict Because Pacesetter Expressly Consented To The Arbitrator's Jurisdiction.

Pacesetter has blatantly misled this Court in its Petition by asserting that it "repeatedly objected to the arbitrability of the Union's grievance on the ground that it was not a party to the contract with the Union." (Petitioner's Statement of the Case at pg. 4.) Pacesetter did not object to the Arbitrator's authority to decide whether it was a party to the contract with the Union. In fact, the record of the arbitration proceeding proves that Pacesetter sought and expressly consented to the Arbitrator's jurisdiction.

At the Board of Adjustment hearing on January 14, 1992, (the "arbitration" at issue in this case), Pacesetter acknowledged the jurisdiction of the Board to decide the issue of arbitrability before submitting the issue to the Board for decision. Pacesetter stated that the Board "already has jurisdiction over Pacesetter Construction by virtue of arbitration that occurred under the very document that the Union claims creates a contract, namely the 1974 collective bargaining agreement." (Petitioner's Appendix ("Appendix") at pg. 26a, citing to the transcript of the grievance procedures). The Ninth Circuit found that Pacesetter's "posture before the Board of Adjustment leaves it in poor position that it never consented to the Board's deciding the issue of arbitrability." (Appendix at pg. 13a). The Ninth Circuit noted that in disposing of Pacesetter's original appeal it had relied on *George Day* by holding that Pacesetter consented to the Board's jurisdiction by arguing the issue of arbitrability without preserving its objection to jurisdiction. (Appendix at pg. 13a) However, the Ninth Circuit found an additional reason to confirm the arbitration award by holding that Pacesetter did more than argue arbitrability, "it repeatedly asserted that the Board's jurisdiction stemmed

from its original jurisdiction over the 1981 grievance, and that the 1981 decision of the Board remained in effect and controlled the 1991 proceeding." (Appendix at pg. 13a) The Ninth Circuit noted that Pacesetter's counsel engaged in the following colloquy with the Arbitrator which manifested Pacesetter's consent to the Arbitrator's authority to decide the dispute.

> Mr. Schaffer: [W]e're appearing here because we believe you already had jurisdiction of this '81 grievance. That's why we didn't say there's no jurisdiction, go to court, et cetera. There's a previous decision and we're saying that was decided and it's final and it's binding on the panel. And it's binding on the local union.
>
> [Arbitrator]: In effect what you're—can I characterize your motion that you have just made, the last one, as being a special appearance then at this point?
>
> Mr. Schaffer: Well, we're not certain a special appearance is proper because the panel already has jurisdiction over Pacesetter Construction by virtue of an arbitration that occurred under the very document that the union claims creates a contract, namely the '74 document, '74 me too agreement. And there's an arbitral award on that. So that if we appeared here, we can't specially appear now when that proceeding is *res judicata* on this panel and this union.

(Appendix at pg. 14a, citing to the transcript of the grievance procedure). In light of this exchange, the Ninth Circuit concluded that Pacesetter did more than simply argue arbitrability. Pacesetter repeatedly asserted the Board's jurisdiction, and thereby consented to the Arbitrator's authority to decide the dispute. Moreover, the Ninth Circuit distinguished *First Options* by stating that unlike Pacesetter, the Kaplans in *First Options* "made clear" that they did not want the arbitrator to exercise jurisdiction over the dispute. (Appendix at pg. 14a)

Pacesetter's conduct surpasses the implied consent doctrine set forth in *George Day* because Pacesetter expressly

consented to the Arbitrator's jurisdiction. Furthermore, even if the holding of *First Option*s applies to labor arbitration, Pacesetter is still bound by the arbitration award because its conduct also meets the standards set forth in *First Options*. In *First Options*, this Court stated that "the court should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options*, 131 L.Ed.2d at 994 (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649). This Court then held that the Kaplans did not consent to the arbitrator's authority and stated that merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue. *Id.* Here, Pacesetter expressly stated that the Arbitrator had jurisdiction to decide the dispute and refused to make a special appearance. There can be no doubt, that based upon the position taken by Pacesetter as set forth in the record, that Pacesetter was aware of its right to go to court, was aware of the issue of the existence of the collective bargaining agreement and its effect on the question of the Board's jurisdiction to decide the question of arbitrability. Nevertheless, Pacesetter, confident in its *res judicata* theory, rejected the invitation to make a special appearance, and by its unequivocal position, consented, and agreed to a decision by the Board of Adjustment on the issue of the arbitrability of the dispute. Therefore, even under the commercial context of *First Options*, the record of the Arbitration proceeding provides clear and unmistakable evidence of Pacesetter's agreement to arbitrate the question of arbitrability.

The facts of this case do not embrace the purported conflict that Pacesetter alleges exists between the Ninth Circuit's decision below and *First Options*. Pacesetter clearly consented to the Arbitrator's authority and under *George Day, AT & T Technologies* and *First Options*, Pacesetter is clearly bound by the Arbitrator's award. Therefore, a substantial question warranting Supreme

Court review does not exist and the Union requests that this Court deny Pacesetter's Petition.

B. There Is No Conflict Because *First Options* Is A Commercial Arbitration Case Decided Under The Federal Arbitration Act.

Pacesetter asserts that there are no fundamental differences between commercial and labor arbitration which justify the Ninth Circuit's determination that *First Option* does not apply to cases that arise under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"). As set forth below, Pacesetter's position contradicts over 30 years of Supreme Court and Federal Court of Appeals precedent.

Pacesetter fails to recognize that the Ninth Circuit in the decision below refused to apply *First Options* to the collective bargaining context, in particular to reverse the implied consent doctrine of *George Day*, because to do so would be inconsistent with federal labor policy. (Appendix at pg. 13a) *Pacesetter* and *George Day* were decided in the collective bargaining context and federal labor policy mandated the holdings of each case. *First Options*, as a commercial arbitration case based primarily on state contract law principles, must not disturb these decisions because to do so would undermine the effectiveness of labor arbitration and of collective bargaining. Whether the Federal Arbitration Act ("FAA") currently favors arbitration in the commercial context is irrelevant because labor and commercial arbitration are still fundamentally different.

1. *Fundamental Differences Between Labor And Commercial Arbitration Require That* First Options *Should Not Apply To Labor Arbitration.*

Well settled legal precedent has established that commercial arbitration law is inapposite to labor arbitration if inconsistent with the precepts of federal labor policy. *See, United Steelworkers v. Warrior & Gulf Navigation*

Co., 363 U.S. 574, 4 L.Ed.2d 1409, 80 S.Ct. 1347 (1960); *Stead Motors v. Automotive Machinists Lodge 1173*, 886 F.2d 1200 (9th Cir. 1989) (*en banc*) *cert. denied*, 495 U.S. 946, 109 L.Ed.2d 531 (1990). By seeking to expand the scope of *First Options* into the unique realm of labor arbitration, Pacesetter jeopardizes the role labor arbitration plays as the preferred method of resolving labor disputes.

The public policy favoring arbitration of labor disputes as the preferred method for achievement of industrial peace was authoritatively and emphatically established in the *Steelworkers Trilogy*. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 4 L.Ed.2d 1403, 80 S.Ct. 1343 (1960); *United Steelworkers v. Warrior & Gulf Navigaiton Co.*, 363 U.S. 574, 4 L.Ed.2d 1409, 80 S.Ct. 1347 (1960); and *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 4 L.Ed.2d 1424, 80 S.Ct. 1358 (1960). In the examination and application of federal policy, courts have drawn crucial distinctions between commercial and labor arbitration which establish that each serves a different purpose. The origin of distinctions between labor and commercial arbitration lies in the doctrine that in the labor context, pursuant to section 301 of the LMRA, courts are to fashion a body of federal law from the policy of our national labor laws. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456, 1 L.Ed.2d 972, 980, 77 S.Ct. 912, 920 (1957). Because courts must consider federal labor policy when rendering a decision in a labor arbitration case and not in a commercial arbitration case, differences in the treatment of labor and commercial arbitration are both inevitable and necessary.

Considering federal labor policy, this Court drew crucial distinctions between labor and commercial arbitration. This Court in considering the level of judicial deference which should be given to an arbitrator's decision in a labor arbitration case stated the following:

> In the commercial arbitration case, arbitration is a substitute for litigation. Here arbitration is a substitute for industrial strife. Since arbitration of a labor dispute has quite different functions from arbitration under an ordinary commercial agreement, the hostility evidenced by the courts towards arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

Warrior & Gulf Navigation Co., 362 U.S. at 578. This language evidences the crucial role labor arbitration plays in the collective bargaining process and in maintaining industrial peace. Due to these differences between labor and commercial arbitration, this Court has expressly held that the holdings of commercial arbitration cases, at least when hostile to collective bargaining, are "irrelevant" to labor arbitration cases. *Id.*

This Court further elaborated on the distinctions between commercial and labor arbitration in *Gateway Coal Company v. United Mineworkers of America*, 414 U.S. 368, 38 L.Ed.2d 583, 94 S.Ct. 629 (1974). In holding that the dispute was arbitrable under the broad arbitration clause of the agreement, this Court stated:

> A collective bargaining agreement cannot define every minute aspect of the complex and continuing relationship between the parties. Arbitration provides a method for resolving the unforeseen disagreements that inevitably arise. And in resolving such disputes, a labor arbitrator necessarily and appropriately has resort to considerations foreign to courts.

Gateway Coal, 414 U.S. at 378.

Similarly, the Ninth Circuit examined the differences between labor and commercial arbitration in *Stead Motors v. Automotive Machinists Lodge 1173*, 886 F.2d 1200 (9th Cir. 1989) (*en banc*) *cert. denied*, 495 U.S. 946, 109 L.Ed.2d 531 (1990). While emphasizing that arbi-

tration of labor disputes "is an essential feature of the collective bargaining process . . . maintaining equity and a balance of power in the workplace", the Ninth Circuit stated that the arbitrator, in the labor context, serves a function different from that served by the arbitrator in the commercial context. *Id.*, at 1205. Unlike the commercial arbitrator, the labor arbitrator does not merely provide an alternative means of dispute resolution but also acts as the parties' surrogate. *Id.* Due to these differences, the Ninth Circuit stated that judicial scrutiny of a labor arbitrator's decision is much more limited because it shall be upheld as long as it draws its "essence" from the collective bargaining agreement. *Id.* at 1208, *citing Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

Due to the fundamental differences between commercial and labor arbitration and following *Stead Motors* and the *Steelworkers Trilogy*, the Ninth Circuit held that commercial arbitration law shall not be applied in the collective bargaining context if inconsistent with federal labor policy. *United Brotherhood of Carpenters and Joiners of America, Local No. 1780 v. Desert Palace*, 94 F.3d 1308, 1312 (9th Cir. 1996). The Ninth Circuit's rationale, in part, was that the policy concerns expressed in *First Options* do not come into play in the collective bargaining context. *Id.* at 1311. Asserting that there are fundamental differences between commercial and labor arbitration which make the application of *First Options* inappropriate, the Ninth Circuit stated the following:

> Unlike parties in the commercial arbitration context, parties entering into a collective bargaining agreement know they are granting the arbitrator tremendous power to define and "fill in the gaps" of their agreement. In the collective bargaining context, the issue of who gets to decide arbitrability is not an "arcane" question the parties do not think about. By entering into a collective bargaining agreement, the parties know they will get an arbitrator rather than the courts to decide any labor dispute that arises

> under their collective bargaining agreement, including a dispute over arbitrability.

Id., at 1311.

The distinguishing features of labor arbitration which mandate different treatment from commercial arbitration have been noted by the other circuits. *See, e.g., Harry Hoffman Printing, Inc. v. Graphic Communications International Union, Loal 261*, 950 F.2d 95, 98 (2nd Cir. 1991) (for purposes of avoiding industrial strife, settled national policy holds that voluntary arbitration under a collective bargaining agreement is the preferred method of resolving disputes between labor and management); *Sterling Colorado Beef Co. v. United Food & Commercial Workers, Local Union No. 7*, 767 F.2d 718, 721 (10th Cir. 1985) (the arbitrator's source of law is not confined to the express provisions of the collective bargaining agreement but rather the practices of the industry and the shop are equally a part of the collective bargaining agreement although not expressed in it.); and *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1454 (10th Cir. 1997) *petition for cert. filed 8/6/97* (In labor arbitration, the arbitrator is the protector of the bargain, and his task is to effectuate the intent of the parties while in the commercial context, the arbitrator provides a forum for the vindication of public rights.).

Labor and commercial arbitration also differ because they are governed by different statutes. Since the FAA, 9 U.S.C., *et seq.*, excludes "contracts of employment" from its coverage, the FAA does not apply to collective bargaining agreements. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9, 98 L.Ed.2d 286, 300 n.9, 108 S.Ct. 364, 378 n.9 (1987); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1454 (10th Cir. 1997); *Glass Molders, Pottery, Plastic and Allied Workers, International Union, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 848 (8th Cir. 1995); *San Diego County Dist. Council v. Cory*, 685 F.2d 1137,

1141 (9th Cir. 1982); *American Postal Workers Union v. U.S. Postal Service*, 823 F.2d 466, 469-473 (11th Cir. 1987). As a result, commercial arbitration is governed by the FAA while labor arbitration is governed by the LMRA and federal common law derived from federal labor policy.

The fact that labor and commercial arbitration are governed by different statutes has played a part in the refusal by some courts to apply commercial arbitration law in the collective bargaining context. In *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 114 L.Ed.2d 26, 111 S.Ct. 1647 (1991), this Court suggested that commercial cases governed by the FAA should not impact labor arbitration law. In *Gilmer*, this Court held that compulsory arbitration provisions could preclude judicial resolution of employment discrimination claims. Rather than overrule a line of labor arbitration cases, including *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974), which held that compulsory arbitration provisions in collective bargaining agreements did not preclude judicial resolution of statutory claims, the Court distinguished these cases. In distinguishing the labor arbitration cases, the Court stated that those cases occurred in the context of a collective bargaining agreement and were not decided under the FAA. Therefore, *Gilmer's* analysis suggests that commercial arbitration law does not apply to labor arbitration cases if inconsistent with federal labor policy.

The circuits have followed this Court's suggestion that cases decided under the FAA should not impact labor arbitration. *See, e.g. Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1454 (10th Cir. 1997). In *Harrison*, the Tenth Circuit notes that a majority of the circuits have refused to apply *Gilmer* to the collective bargaining context and have held that *Alexander v. Gardner-Denver Co.* remains good law.

Since courts deciding a labor arbitration case must consider federal labor policy and the distinctions between labor and commercial arbitration, it therefore follows that *First Options* should not impact the Ninth Circuit's decision below. *First Options* was a commercial arbitration case involving demands for payment by a firm dealing with the trading of securities. Since *First Options* involved commercial arbitration, this Court, in rendering that decison, did not take federal labor policy into consideration. Specifically, it was not necessary for this Court to consider the fundamental differences between labor and commercial arbitration. This Court did not consider that the stakes are much greater in labor arbitration. While the failure of commercial arbitration would result in more litigation, the failure of labor arbitration would result in a breakdown in the collective bargaining process and would lead to an increase in work stoppages, loss of production and other related industrial strife. This Court also did not consider that the parties to a collective bargaining agreement often have more equality of bargaining power than the parties to a commercial contract. Since federal labor policy was not considered and the distinctions not recognized, the holding of *First Options* must not apply to the Ninth Circuit's decision below.

Pacesetter dangerously assumes that because *First Options* cites a few fundamental labor arbitration cases this Court must have intended for *First Options* to apply in the collective bargaining context. *First Options* merely relies upon *AT&T Technologies*, 475 U.S. 574 and *Warrior & Gulf Navigation Co.*, 363 U.S. 593, for the rule that the issue of arbitrability is for the courts to decide unless there is an agreement to the contrary. *First Options*, 131 L.Ed.2d 985, 994. This is an established rule of law in both the labor and commercial context, was not in dispute in *First Options*, and is not in dispute in this case. While labor arbitration is a unique creature and the law that governs the process must take into

account federal labor policy, commercial arbitration is not subject to such considerations. It therefore follows that commercial arbitration cases may rely on labor arbitration law, but labor arbitration cases must not rely on commercial arbitration law that is inconsistent with federal labor policy. Pacesetter cites *Three Valleys Mun. Water Dist. v. E.F. Hutton*, 925 F.2d 1136 (9th Cir. 1991), *Painewebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996) and *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994) in support of its argument that there are no distinctions between commercial and labor arbitration because these commercial arbitration cases cite labor precedent. However, the use of labor precedent in commercial arbitration cases does not indicate that the unique nature of labor arbitration should be subject to commercial arbitration law.

Moreover, although *First Options* cites two labor arbitration cases, it primarily relies on commercial arbitration cases and the rationale and purpose behind the FAA. For example, the beginning of the *First Options* decision sets forth that this Court was deciding "two questions about how courts should review certain matters under the federal Arbitration Act." *First Options*, 131 L.Ed.2d 985, 991. This Court, relying on numerous commercial arbitration cases, also stated that "the basic objective in this area . . . is to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms." *Id.* at 995. In addition, this Court cited the principle that the purpose of the FAA is "to ensure judicial enforcement of privately made agreements to arbitrate." *Id.*, at 994. Finally, this Court relied heavily on the fact that there is no strong arbitration-related policy in the commercial context relating to the issue of who has the primary authority to decide arbitrability. *Id.*, at 995. The language of this Court evidences that it was concerned with the policies underlying commercial arbitration and further invalidates Pacesetter's unfounded assumption

that this Court intended *First Options* to apply to labor arbitration.

Having no reason to consider federal labor policy and the distinctions between labor and commercial arbitration, this Court implicitly limited the holding of *First Options* to commercial arbitration cases. This Court must not follow the dangerous path of applying commercial arbitration law to labor arbitration cases because such application would be inconsistent with the federal labor policy favoring arbitration as the preferred method of solving labor disputes and would weaken the collective bargaining process.

2. First Options *Must Not Apply To Labor Arbitration Because It Is Inconsistent With Federal Labor Policy.*

As set forth above, the fundamental differences between labor and commercial arbitration require that commercial arbitration law should not apply to labor arbitration if inconsistent with federal labor policy. Pursuant to *First Options*, arbitration awards in favor of unions could be set aside if the employer asserts some ambiguity in the record as to its position regarding the question of arbitrability. This decision would essentially allow an employer a second bite at the apple, undermining the purpose of binding arbitration. The employer could participate in a speedy and inexpensive arbitration proceeding pursuant to the collective bargaining agreement and when faced with an unfavorable decision, the employer could rely on its intentionally ambiguous position regarding the question of arbitrability and seek to have the decision set aside in court.

While this result would have minimal impact in the commercial setting, it would have a substantial impact in the labor context because it would result in the subversion of collective bargaining processes and grievance resolution. Labor arbitration would essentially become the employer's tool to save money and to test the waters.

It would render binding arbitration agreements meaningless if employers could escape the binding effect by inserting some ambiguity in the record as to its position on arbitrability. Unions would lose faith in the use of arbitration as a means of settling disputes, reducing the use of anti-strike clauses in collective bargaining agreements. This would lead to an increase in industrial strife. In addition, application of the holding of *First Options* to labor arbitration cases would flood the courts with cases that were properly resolved by an arbitrator. These results are clearly at odds with federal labor policy which aims at industrial peace through the use of labor arbitration. Consideration of federal labor policy requires that *First Options* not apply to this case because its holding is inconsistent with the federal interest in fostering the collective bargaining process.

C. There Is No Conflict Because The Implied Consent Doctrine Is Consistent With *First Options*.

In the decision below, the Ninth Circuit relied in part on the implied consent doctrine of *George Day* in finding that Pacesetter had consented to the jurisdiction of the arbitrator. (Appendix at pg. 13a) In relying on *George Day*, the Ninth Circuit has re-affirmed the principle that consent to grant the arbitrator authority to decide the arbitrability of a dispute arising under a collective bargaining agreement may be implied from the conduct of the parties in the arbitration setting. (Appendix at pg. 13a)

In *George Day*, the Ninth Circuit held that the employer by his conduct evinced clearly its intent to allow the arbitrator to decide not only the merits in dispute but also the question of arbitrability. *George Day*, 722 F.2d at 1475, citing *International Brotherhood of Teamsters, Local 117 v. Washington Employers, Inc.*, 557 F.2d at 1350; and *Ficek v. Southern Pacific Co.*, 338 F.2d at 656-657. Consent was implied by the employer's conduct because the arbitrability issue was argued along with

the merits, the case including the arbitrability issue was voluntarily submitted to the arbitrator for decision, and the employer did not evidence any intent to reserve its right to independent judicial review of the arbitrability issue. *George Day*, 722 F.2d at 1475.

This implied consent doctrine is consistent with *First Options*. Under *First Options*, a party's conduct at the arbitration that clearly demonstrates his or her intent to grant the arbitrator the authority to decide the question of arbirability, constitutes "clear and unmistakable" evidence of an agreement to arbitrate arbitrability. The holding of *First Options* does not preclude a court from finding that a party consented by its conduct to the arbitrator's jurisdiction. Such conduct by an employer would not constitute the silence or ambiguity about the question of who decides arbitrability that concerned this Court in *First Options*. Furthermore, *George Day* is also consistent with the statement in *First Options* that "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue." *First Options*, 131 L.Ed.2d at 994. Under *George Day*, merely arguing the arbitrability issue to an arbitrator does not indicate consent to the arbitrator's authority as long as the employer engages in some conduct which evidences his or her intent to seek independent judicial review of the issue.

George Day and the decision below further define what constitutes clear and unmistakable evidence of an agreement to have the arbitrator decide the issue of arbitrability and thus are consistent with *First Options*. Therefore, there is no conflict worthy of Supreme Court review and the Union requests that Pacesetter's Petition be denied.

II. THERE IS NO SPLIT AMONG THE CIRCUITS OVER THE APPLICATION OF *FIRST OPTIONS* TO CASES ARISING UNDER SECTION 301 OF THE LMRA.

Pacesetter seeks to create a conflict among the circuits regarding the applicability of *First Options* to cases arising under section 301 of the LMRA. Pacesetter has mischaracterized the law of the circuits in an attempt to create a conflict where one does not exist.

The Ninth Circuit is the *only* circuit that has addressed whether *First Options,* as a commercial arbitration case, should apply to cases that arise under section 301 of the LMRA. In *Desert Palace*, 94 F.3d 1308, the Ninth Circuit held that *First Options* should not apply to labor arbitration because of the fundamentally different policy concerns that govern labor arbitration. In *Desert Palace,* the Court re-affirmed the labor doctrine that a broad arbitration clause grants the arbitrator authority to decide his or her own jurisdiction. The Court then held that its conclusion is "not affected by the Supreme Court's recent decision in *First Option.*" *Desert Palace,* 94 F.3d at 1309. The Court noted that *First Options* relied on commercial arbitration policies that "do not come into play" in the collective bargaining context and discussed the fundamental differences between labor arbitration and commercial arbitration. Finally, the Court stated that "to extend *First Options* to the collective bargaining context would contravene the intention of parties who have entered into collective bargaining agreements, weaken the power of arbitrators in resolving labor disputes, and undermine the effectiveness of arbitration in maintaining industrial peace." *Desert Place,* 94 F.3d at 1310.

Following *Desert Palace,* the Ninth Circuit, in the decision below, similarly held that "it is not appropriate to transfer wholesale the rationale of *First Options* to the collective bargaining context." (Appendix, at pg. 11a)

Applying the rationale of *Desert Palace*, the Court stated the following:

> Pacesetter was a party to the Agreement, however. The only question is whether it had effectively repudiated it. Once the Agreement was in effect, all of *Desert Palace's* policy reasons for arbitrating disputes between the parties to labor disputes came into play, and applied as well to the contested issue of repudiation. Especially was this so when Pacesetter argued the issue of repudiation to the arbitrator. . . . Because of the policy considerations set forth in *Desert Palace* and discussed above, we conclude that *George Day* survives *First Options* and controls this case.

Desert Palace, 94 F.3d at 1309.

No other circuit has decided, or even addressed the issue of whether *First Options*, as a commercial arbitration case, applies to cases that arise under section 301 of the LMRA. Pacesetter cites three cases from other circuits in an attempt to create a conflict. However, each of these cases cite *First Options* for a general principle applicable in both the labor and commercial context and not at issue in this case.

In *Aircraft Braking Systems Corp. v. Local 856, UAW*, 97 F.3d 155 (6th Cir. 1996), *cert. den.*, —— U.S. ——, 137 L.Ed.2d 475, 117 S.Ct. 1311 (1997), the Sixth Circuit cites *First Options* for the general proposition that courts should not assume that the parties have agreed to arbitrate the question whether there is a valid agreement to arbitrate without clear and unmistakable evidence that the parties so intended. 97 F.3d at 160, citing *First Options*, 131 L.Ed.2d at 984. This same general principle was first announced in *AT&T Technologies*, 475 U.S. 673, 649, and was subsequently adopted by commercial arbitration cases. *Aircraft Braking* merely cites First *Options* as the most recent case which re-affirms this general principle. Moreover, the Sixth Circuit did not cite

First Options for a proposition inconsistent with federal labor policy. The Sixth Circuit merely held that because the employer protested the arbitrator's authority at the outset of the arbitration, the parties in that case had not "clearly and unmistakably" agreed to submit the arbitrability issue to the arbitrator. *Aircraft Braking*, 97 F.3d at 160. The Sixth Circuit's use of *First Options* does not create a conflict in the circuits over the applicability of *First Options* to cases that arise under § 301 of the LMRA. Unlike the Ninth Circuit, the Sixth Circuit has not entertained or even reached the issue of whether *First Options*, as a commercial arbitration case, should apply in the collective bargaining context.

In addition, *Aircraft Braking's* facts are distinguishable from the facts of this case. In *Aircraft Braking*, the employer won at the arbitration level but then lost because the district court found that the parties did not submit the issue of arbitrability to the arbitrator. Thus, the employer, citing *First Options*, argued on appeal that it *did* submit the issue of arbitrability to the arbitrator. The Sixth Circuit noted that the employer protested at the outset of the arbitration and now argues that it submitted the issue to arbitration. *Aircraft Braking*, 97 F.3d at 161. The court further noted that if the employer would have lost in arbitration, it would now be arguing that it did not submit. *Id.* Because the employer "cannot have it both ways", the Sixth Circuit held that the parties did not submit the issue of arbitrability to the arbitrator. *Id.*

The Sixth Circuit's position that an employer "cannot have it both ways" supports the Ninth Circuit's holding in the decision below. Pacesetter expressly consented to the arbitrator's jurisdiction, argued the merits of the dispute and submitted the issue to the arbitrator for determination. When Pacesetter lost at the arbitration level, it sought independent judicial review of the arbitrability issue. If Pacesetter would have won at the arbitration

level it would not have sought judicial review. The Ninth Circuit has therefore prevented Pacesetter from "having it both ways" and has acted in accordance with the Sixth Circuit's concerns.

Likewise, the Seventh Circuit in *Local 744, International Brotherhood of Teamsters v. Hinckley and Schmitt, Inc.*, 76 F.3d 162 (7th Cir. 1996), relies on *First Options* only for the general principle that the issue of arbitrability is for the courts to decide unless there is a clear and unmistakable agreement to the contrary. Therefore, the Seventh Circuit's application of *First Options* does not create a conflict in the circuits over the application of *First Options.*

In addition, Pacesetter attempts to create a conflict with the Eighth Circuit due to *Excel Corp. v. United Food & Commercial Workers*, 102 F.3d 1464 (8th Cir. 1996) and a conflict within the Ninth Circuit itself due to *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 631 v. Silver State Disposal Service*, 109 F.3d 1409 (9th Cir. 1997). However, in both of these cases, the courts merely cite *First Options* for the appellate standard of review of district court decisions. These cases did not address the applicability of *First Options* to the collective bargaining context or even address the issue of who has primary authority to determine arbitrability. Pacesetter's attempt to use these cases to create a conflict among the circuits is therefore completely unfounded.

Finally, in *Abram Landau Real Estate and Woodland Realty Co. v. Gus Benova*, 123 F.3d 69 (2nd Cir. 1997) the Second Circuit refused to decide the issue of whether *First Options* is limited to the commercial context and does not apply to labor disputes. The Second Circuit stated the following:

> It is noteworthy that the Ninth Circuit recently held that *First Options* is limited to the commercial context and does not apply to labor disputes. *See United*

> *Brotherhood of Carpenters v. Desert Palace, Inc.*, 94 F.3d 1308 (9th Cir. 1996); *Pacesetter Construction Co., v. Carpenters 46 N. Cal. Counties Conference Board*, 1997 W.L. 345974 (9th Cir. June 25, 1997). The Ninth Circuit recognized that "there was no strong federal policy favoring arbitration of commercial disputes, while . . . there is a strong federal policy favoring arbitration of labor disputes . . ." *United Brotherhood*, 94 F.3d at 1311. The Supreme Court has also recognized that there is a strong presumption in favor of arbitrability in the labor context. *See AT&T Technology*, 475 U.S. at 650. We need not go as far as the Ninth Circuit, because even if *First Options* were extended to the labor context it would not apply to arbitrability questions involving the termination or expiration of the collective bargaining agreement.

Abram Landau, 123 F.3d at 72. The Second Circuit's refusal to address the issue of whether *First Options* applies in the collective bargaining context is further evidence that there is no conflict in the circuits.

Moreover, the Second Circuit has limited *First Options* to the single arbitrability issue of whether the parties *ever* entered into a valid arbitration agreement at all. *Id.*, at 70. In *Abram Landau*, the employer attempted to extend *First Options* to all questions of arbitrability, including whether an otherwise valid collective bargaining agreement has expired or been terminated. *Id.* The Second Circuit held that it would "not read *First Options* so expansively." *Id.* The Second Circuit's rationale was that the case did not raise the same concerns that led to the *First Options* holding because the case arose in a "scenario where the parties had a valid arbitration agreement and, in the language of *First Options*, 'gave at least some thought to the scope of arbitration.'" *Id.*, at 72. Since the parties were at one time bound to an arbitration agreement, the Second Circuit refused to apply *First Options* to reverse the presumption favoring the arbitration of disputes, including the issue of arbitrability.

Like the dispute in *Abram Landau*, the dispute in this case does not involve whether the parties ever entered into a valid arbitration agreement, but rather, involved whether Pacesetter had repudiated the contract. The parties do not dispute that Pacesetter was at one time bound to the collective bargaining agreement. Therefore, under the Second Circuit's holding in *Abram Landau*, *First Options* would not impact the Ninth Circuit's decision below.

Besides the insignificant cases cited by Pacesetter in its Petition, the Union is aware of no other labor arbitration cases which apply the holding or rationale of *First Options*. In fact, the rest of the cases which cite *First Options* are commercial arbitration cases governed by the FAA. The Second Circuit in *Painewebber, Inc. v. BYBYK*, 81 F.3d 1193 (2nd Cir. 1995), supports limiting *First Options* to commercial arbitration cases by confirming that *First Options* reverses the *"FAA's presumption"* in favor of arbitration when there is an ambiguity in the arbitration agreement as to who is to decide the issue of arbitrability. *Id.* at 1198 (emphasis added).

There is no conflict in the circuits regarding the applicability of *First Options* to cases that arise under § 301 of the LMRA. As stated above, the Ninth Circuit is the only circuit to have addressed this issue. Until another circuit decides whether *First Options* applies to the collective bargaining context in a manner that directly conflicts with the Ninth Circuit, there is no conflict among the circuits warranting Supreme Court review. Therefore, the Union requests that this Court deny Pacesetter's Petition.

III. THERE IS NO SPLIT AMONG THE CIRCUITS REGARDING WHO HAS THE PRIMARY AUTHORITY TO DECIDE ARBITRABILITY.

Pacesetter claims that the Third, Seventh, Sixth and Second Circuits are in conflict with the Ninth Circuit and Eighth Circuit (and by extension, with *AT&T Tech-*

nologies) over what is required to establish that a party agreed to have the arbitrator decide arbitrability and waive independent judicial review of the arbitrability issue. Specifically, Pacesetter asserts that the Ninth and the Eighth Circuits differ from the other circuits because they require a party that argues the issue of arbitrability to an arbitrator to also take affirmative steps to indicate that it also wishes to seek independent judicial review of the arbitrability issue. In doing so, Pacesetter seeks to overturn an entire line of cases going back to 1964 which hold that where a party submits its case to the arbitrator upon the merits, without reservation of the question of jurisdiction, the party has implied by its conduct its consent to the arbitrator's jurisdiction and has waived its right to subsequent judicial examination of the issue of arbitrability. *George Day*, 722 F.2d 1471 (9th Cir. 1984); *Interstate Brands v. Chauffeurs, Teamsters Local 135*, 909 F.2d 885 (6th Cir. 1990); *Franklin Electric Co. v. International Union, UAW*, 886 F.2d 188 (8th Cir. 1989); *Syufy Enterprises v. Northern California State Ass'n of IATSE Locals*, 631 F.2d 124 (9th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *International Brotherhood of Teamsters, Local 117 v. Washington Employers, Inc.*, 557 F.2d 1345 (9th Cir. 1977); *Ficek v. Southern Pacific Co.*, 338 F.2d 655 (9th Cir. 1964); *Vic Wertz Distributing v. Teamsters Local 1038*, 898 F.2d 1136 (6th Cir. 1990).

From the Third Circuit, Pacesetter cites *Pennsylvania Power Co. v. Local Union No. 272 of IBEW*, 886 F.2d 46, 50 (3rd Cir. 1989) for the proposition that a party must "clearly indicate his willingness to forego judicial review." However, Pacesetter fails to cite the underlying premise of the *Pennsylvania Power* case that "where a party voluntarily submits an issue to arbitration without challenging the arbitrability of that issue, and where the merits are ruled upon by the arbitrator, that party may be deemed to have waived his right to judicial review of the arbitrability issue." *Id.* Indeed, even in the Third Circuit, the party must make an objection to the arbitrator's authority. Thus, in the Third Circuit, a party's con-

duct must indicate that it is not granting the arbitrator the authority to resolve the arbitrability issue and that it intends to seek judicial review of the arbitrability issue. The Third Circuit's position is therefore consistent with the Ninth and the Eighth Circuits.

Likewise, the Seventh Circuit is in accord with the Ninth and Eighth Circuits because it has held that "[i]f a party voluntarily and unreservedly submits an issue to arbitration, he cannot later argue that the arbitrator had no authority to resolve it." *International Ass'n of Machinists and Aerospace Workers, Lodge No. 1777 v. Fansteel, Inc.*, 900 F.2d 1005, 1009 (7th Cir. 1990), *cert. denied*, 498 U.S. 851 (1990), citing *Jones Dairy Farm v. Local No. P-1236 UFCW Int'l Union*, 670 F.2d 173, 175-176 (7th Cir. 1985). The holding of *Fansteel* is not affected by the Seventh Circuit's subsequent case *Local 744, International Brotherhood of Teamsters v. Hinckley & Schmitt, Inc.*, 76 F.3d 162 (7th Cir. 1996). As noted above, *Hinckley* merely cites *First Options* for the "clear and unmistakable" standard. Under *Hinckley*, a party that voluntarily submits the issue of arbitrability to the arbitrator without evidencing its intent to seek independent judicial review will be deemed to have consented to the arbitrator's jurisdiction. The Seventh Circuit is therefore in accord with the Ninth and Eighth Circuits.

In addition, the Sixth Circuit's decision in *Airport Braking* is consistent with the Ninth and Eighth Circuits. In *Aircraft Braking*, the employer protested against the arbitrator's authority to hear the dispute on the ground that there was no agreement on which the arbitrator could base its decision. Based on the employer's conduct, the court did not believe that the parties voluntarily submitted the arbitrability issue to the arbitrator. However, under *Aircraft Braking*, an employer who implies by its conduct that the arbitrator has authority by voluntarily submitting the issue of arbitrability to the arbitrator for decision without reserving its right to court review, will be found to have consented to the arbitrator's jurisdiction and waived their right to court review. Therefore, *Air-*

craft Braking does not conflict with the Ninth and Eighth Circuits.

Finally, Pacesetter fails to cite a Second Circuit case which would even potentially conflict with the Ninth and Eighth Circuits. Pacesetter merely cites *Torrington Co. v. Metal Products Workers Union, Local 1685, UAW*, 362 F.2d 677, 680-681 (2nd Cir. 1966), which involved whether the arbitrator had the authority to add to the terms of the collective bargaining agreement based on the parties' prior practice. *Torrington Co.* did not involve the issue of who has the primary authority to decide the issue of arbitrability and therefore does not support Pacesetter's theory that a conflict exists among the circuits.

Pacesetter has once again mischaracterized the facts of cases in an attempt to create a conflict in the circuits where one does not exist. The Second, Third, Sixth and Seventh Circuits are all in accord with the Ninth and Eighth Circuits over the issue who has the primary power to decide the issue of arbitrability. All of these circuits agree that the issue of arbitrability is for the courts to decide unless there is clear and unmistakable evidence to the contrary. In all these circuits, a party's conduct which evidences consent to grant the arbitrator jurisdiction will constitute clear and unmistakable evidence that the parties agreed to have the arbitrator determine arbitrability and waive judicial review. Therefore, there is no conflict among the circuits.

Furthermore, even if there is a conflict in the circuits, this case does not embrace this purported conflict because the facts evidence that Pacesetter *never objected* to the arbitrability of the grievance. As the Ninth Circuit found in the decision below, Pacesetter "repeatedly asserted" that the Board had jurisdiction over the grievance. The record demonstrates that Pacesetter wanted the arbitrator to resolve the matter and thus never objected to the arbitrator's authority. Since the facts of this case do not embrace the purported conflict, this case does not raise a substantial question warranting review by this Court.

CONCLUSION

Pacesetter has not presented any new issue or matter of importance for this Court to consider. There are no conflicts between the decisions of the Ninth Circuit and this Court, nor any conflicts among the circuits, warranting review by this Court.

The record proves that Pacesetter expressly consented to the Board's jurisdiction to decide the dispute. Pacesetter had the opportunity to object to the Board's jurisdiction and reserve its right to independent judicial review. However, Pacesetter, confident in its theories, sought the Board's determination of the dispute. Pursuant to federal labor policy, and Supreme Court and Federal Court of Appeals precedent, Pacesetter is bound to the decision of the Board and the Ninth Circuit was correct in affirming the judgment of the district court confirming the award of the Board.

Based upon the foregoing arguments and authorities, Carpenters 46 Northern California Counties Conference Board respectfully requests that this Court deny Pacesetter's Petition for Writ of Certiorari.

Respectfully submitted,

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November 7, 1997

(3)

Supreme Court, U.S.
FILED
NOV 18 1997
CLERK

No. 97-532

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PACESETTER CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES
CONFERENCE BOARD,
Respondent.

Petition For A Writ Of Certiorari To The United States Court
Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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15 pp

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

A. Pacesetter Did Not Clearly and Unmistakably Agree to Submit and Be Bound By the Arbitrator's Determination Regarding Arbitrability 2

B. The Holding of *George Day* Cannot Be Harmonized With The Holding of First Options 4

C. *Abram Landau* More Clearly Illustrates the Split in the Circuits Developing as a Result of the Ninth Circuit's Refusal to Apply First Options in Section 301 Cases . . 7

D. There are No Fundamental Differences in Policy Which Justify The Imposition of an Agreement to Arbitrate on an Unwilling Party 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Abram v. Landau Real Estate v. Benova,
123 F.3d 69 (2nd Cir. 1997) 5-8

Aircraft Braking Systems Corp. v. Local 856, UAW,
97 F.3d 155 (9th Cir. 1996),
cert. den. ___ U.S. ___,
117 S.Ct. 1311,
137 L.Ed.2d 475 (1997) 8

Camping Construction v. District Council of Ironworkers,
915 F.2d 1333, 1338 (9th Cir. 1990),
cert denied, 500 U.S. 905 and
500 U.S. 953 (1991) 7

Excel Corp. v. United Food and Commercial Workers,
102 F.3d 1464, 1467 (8th Cir. 1996) 8

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938,
115 S.Ct. 1920,
131 L.Ed.2d 985 (1995) . . . . . passim

George Day Constr. v. United Broth. of Carpenters,
722 F.2d 1471 (9th Cir. 1984) 4, 5, 7

Litton Financial Printing Division v. National Labor Relations Board,
501 U.S. 190, 205-206,
111 S.Ct. 2215,
115 L.Ed.2d 177, 196-197 (1991) 6

Page

Local 744, International Brotherhood of Teamsters v. Hinckley & Schmitt, Inc.,
76 F.3d 162 (9th Cir. 1996) 8

Pacesetter Construction Company, Inc. v. Carpenters 46 Northern California Counties Conference Board,
116 F.3d 436 (9th Cir. 1997) 7

Pasadena v. Los Angeles,
118 Cal.App.2d 497, 499,
258 P.2d 28 (1953) 3

Silva v. Providence Hosp. of Oakland,
14 Cal.2d 762, 773,
97 P.2d 798 (1939) 3

Southland Corp. v. Keating,
465 U.S. 1,10,
104 S.Ct. 852, 858,
79 L.Ed.2d 1 (1984) 9

United Brotherhood of Carpenters v. Desert Palace Inc.,
94 F.3d 1308 (9th Cir. 1996) 7, 10

Federal Statutes

Rule 15.6 of the Rules of the Supreme Court of the United States 1

29 U.S.C. §158(f) 6, 7

29 U.S.C. §185 . . . . . 2, 7, 8, 9

Page

State Statutes

California Civil Code §1550 3

Publications

Black's Law Dictionary
1303 (6th ed. 1990) 6

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Petition For A Writ Of Certiorari To The United States Court
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REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

Pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States, Pacesetter Construction Company (hereafter "Pacesetter" or "Petitioner"), hereby replies to new points raised in opposition to its petition for a *writ of certiorari* to review the Ninth Circuit's most recent decision in this case. In particular, Pacesetter takes issue with the Carpenters 46 Northern California Counties Conference Board's (hereafter "Respondent" or "Union") misinterpretation of a recent Second Circuit decision which confirms the existence of a growing split in the circuits

regarding the applicability of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) to arbitration review cases arising under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185.

ARGUMENT

A. Pacesetter Did Not Clearly and Unmistakably Agree to Submit and Be Bound By the Arbitrator's Determination Regarding Arbitrability.

In an attempt to minimize the impact of the Ninth Circuit's determination not to apply the holding of *First Options* to the facts of this case, Respondent asserts erroneously that even if the Ninth Circuit had applied *First Options*, it would have reaffirmed its previous decision. Specifically, Respondent contends that the "undisputable facts established that Pacesetter clearly and unmistakably agreed to submit the dispute to the Arbitrator. Thus, the requirements of *First Options* are met." Oppos. Brief, p. 2. Respondent contends that Pacesetter has "blatantly misled" the Court by arguing that it repeatedly objected to the arbitrability of the Union's grievance "on the ground that it was not a party to the contract with the Union." Oppos Brief, p. 2.

Both at the outset and throughout the hearing before the Board of Adjustment, Pacesetter vigorously argued, that no contract existed between the parties and that Pacesetter had repudiated the contract in 1975.[1/] Petition, App., 7a-8a.[2/]

[1/] The first substantive words out of the mouth of Pacesetter at the arbitration were the following: "I'm going to object to the continuation of this testimony until there's a showing that there's a contract." (See Petitioner's Excerpts of Record on Appeal to the Ninth Circuit, filed February 1, 1994, Ex. C, "Transcript of

(continued...)

In *First Options*, this Court mandated that a court must apply "ordinary state-law principles that govern the formation of contracts," in determining whether a party has "clearly and unmistakably" entered into an agreement to arbitrate arbitrability. *First Options*, 131 L.Ed.2d at 993-994. For example, the Court cited to relevant state law which required a court to assess whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration." *Id.* at 993.

In California, the "true implied contract. . . consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words." *Silva v. Providence Hosp. of Oakland*, 14 Cal.2d 762,773, 97 P.2d 798 (1939). An implied contract "is consensual in nature." *Pasadena v. Los Angeles*, 118 Cal.App.2d 497, 499, 258 P.2d 28 (1953). As with any contract, its elements include not only consent, but a lawful object and consideration. California Civil Code §1550. The Ninth Circuit applied neither these nor any other principles of contract formation.

At the very most, Pacesetter's conduct at the hearing was ambiguous. Where, as here, a party challenges the very existence of a contract, ambiguity cannot overcome a presumption that the party did not intend to submit and be bound by an arbitral determination regarding jurisdiction. *First Options*, 131 L.Ed.2d at 994. To rule otherwise undermines both the consensual nature of arbitration and the consensual nature of contract formation under California law.

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[1] (...continued)
January 14, 1992 Hearing Before Carpenters 46 Northern California Conference Board," p. 7:13-15.)

[2] "App." refers to the Appendix attached to Pacesetter's opening Petition for Writ of Certiorari.

B. The Holding of *George Day* Cannot Be Harmonized With The Holding of *First Options*.

Respondent does not appear to dispute that rather than applying state law principles of contract formation, the Ninth Circuit unilaterally imposed an agreement upon Pacesetter based solely upon conduct occurring at the arbitration hearing. Rather, Respondent contends that the "implied consent doctrine" of *George Day Constr. v. United Broth. of Carpenters*, 722 F.2d 1471 (9th Cir. 1984) -- followed by the Ninth Circuit in the decision below -- further defines "what constitutes clear and unmistakable evidence of an agreement" to arbitrate arbitrability and is thus fully consistent with *First Options*. Oppos. Brief, p. 2, 26-27.

As discussed in Pacesetter's opening Petition (pp. 13-14), in *George Day*, the employer challenged arbitrability on the ground that the dispute did not arise under an expired collective bargaining agreement. The Ninth Circuit held that a party's failure to either object to the arbitrator's authority and refuse to argue the issue or object to jurisdiction and expressly reserve the question on the record constituted a party's "implied consent" to submit the arbitrability issue to the arbitrator and to waive independent judicial review. *Id.* at 1475.

This so-called "implied consent" doctrine is not consistent with the holding of *First Options*. Indeed, quite the opposite is true. Under *First Options*, absent clear and unmistakable evidence of a contract to arbitrate arbitrability the court must presume the challenging party intended to preserve the question of arbitrability for independent judicial review. This standard is directly at odds with the *George Day* standard that places the burden on the party challenging arbitrability to make "clear that it did not want the arbitrator to exercise jurisdiction over its dispute" in the first place. App., 14a.

If *George Day* has any viability at all after *First Options*, it is only when a party's challenge to arbitrability rests either on the assertion that a particular grievance is outside the scope of the agreement;[3] or on the assertion that a post expiration grievance did not arise under an expired or terminated collective bargaining agreement. Nowhere is this more clearly illustrated than in the Second Circuit's decision in *Abram v. Landau Real Estate v. Benova*, 123 F.3d 69 (2nd Cir. 1997), cited by Respondent in its opposition brief. Oppos. Brief, p. 21.[4]

In *Abram Landau*, the Court of Appeals for the Second Circuit carefully analyzed the effect of *First Options* in the context of a labor dispute involving an expired collective bargaining agreement. In rejecting the applicability of *First Options* to the particular facts of that case, the Second Circuit concluded that *First Options* has no viability where a party challenging arbitrability bases that challenge on the fact that a collective bargaining agreement has allegedly expired. The appellate court noted that in the case of an expired agreement:

> [T]he parties' dispute is not really over what an arbitration clause provides; rather, it is a dispute over the interpretation of other clauses of the collective bargaining agreement, e.g., termination clauses, or in [plaintiff's] case, an 'evergreen clause.'

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[3] As noted by this Court, when a party disputes that a particular merits-related dispute is not within the scope of a valid arbitration agreement, the law presumes that the dispute is arbitral. *First Options*, 131 L.Ed 2d at 994.

[4] The *Abram Landau* case was decided on August 15, 1997, shortly before Pacesetter's petition for *writ of certiorari* was filed, and was not discussed in Petitioner's analysis of the case law applying *First Options* in the labor arena.

Id. at 73. Citing *First Options*, the Second Circuit reasoned that in contrast, where the parties dispute the very existence of an agreement to arbitrate, whether the parties are bound by the arbitration agreement is a question of arbitrability that should be decided by the courts, absent clear and unmistakable evidence of an agreement between the parties to submit the question to arbitration. The Second Circuit specifically noted:

> We read *First Options* as a clarification of the type of evidence needed to submit to arbitration a dispute regarding whether parties ever entered into a valid arbitration agreement at all.

Id. at 73.

Respondent contends that the facts of this case are analogous to the facts of *Abram Landau* and therefore, *First Options* is inapplicable. Oppos. Brief, p. 23. Specifically, Respondent asserts that, like the parties in *Abram Landau*, the parties in this case do not dispute whether they entered into a valid arbitration agreement, but rather dispute whether Pacesetter repudiated the contract, a scenario equivalent to that of contract termination or expiration. *Ibid.* Respondent misapprehends the nature of pre-*Deklewa* repudiation under Section 8(f) of the NLRA.

As a matter of law, the repudiation of a contract is equivalent to the denial of its existence. To be more precise, repudiation is the "rejection, disclaimer or renunciation of a contract before performance is due. . ." *Black's Law Dictionary* 1303 (6th ed. 1990). It is not analogous to a dispute regarding the impact of a termination clause on arbitrability.

The holding of *Litton Financial Printing Division v. National Labor Relations Board*, 501 U.S. 190, 205-206, 111 S.Ct. 2215, 115 L.Ed.2d 177, 196-197 (1991) illustrates this point. In *Litton*, this Court held that the duty to arbitrate outlives

an expired collective bargaining agreement where: the grievance involves facts or occurrences that arose before expiration; the action taken after expiration infringes a right that vested before expiration; or under normal principles of contract interpretation, the disputed right survives the contract's expiration. These are issues which involve either a factual assessment of timeliness or an interpretation of provisions in the collective bargaining agreement -- both tasks properly suited for an arbitrator's assessment.

In contrast, as the Ninth Circuit has recognized, a party's contention that it has repudiated a Section 8(f) agreement does not present a question of contract interpretation to be decided by an arbitrator. Rather, it raises a legal question more appropriately decided by the courts. *Camping Construction v. District Council of Ironworkers*, 915 F.2d 1333, 1338 (9th Cir. 1990), *cert denied*, 500 U.S. 905 and 500 U.S. 953 (1991).

In summary, *George Day* cannot be harmonized with the holding of *First Options*. As implicitly recognized by the Second Circuit in *Abram Landau*, *George Day's* "implied consent" doctrine is simply inapplicable where the party challenging arbitrability repeatedly contends -- by repudiation or otherwise -- that a contract does not exist. The Ninth Circuit's reliance on *George Day* in the decision below is in direct conflict with the decision of this Court in *First Options*.

C. *Abram Landau* More Clearly Illustrates the Split in the Circuits Developing as a Result of the Ninth Circuit's Refusal to Apply First Options in Section 301 Cases.

Respondent makes much of the fact that in *Abram Landau*, the Second Circuit declined to directly address the Ninth Circuit's position -- as reflected in *United Brotherhood of Carpenters v. Desert Palace Inc.*, 94 F.3d 1308 (9th Cir. 1996) and *Pacesetter*, 116 F.3d 436 (9th Cir. 1997) -- that *First*

Options has no applicability in the context of a labor dispute. Oppos. Brief, p. 22. Instead, the Second Circuit commented that it need not "go as far," as the case before it fell outside the scope of *First Options*. *Id.* at 74.

Respondent contends that this language indicates that there is no split in the circuits regarding the application of *First Options* in the labor context, and that in fact, the Ninth Circuit is the only circuit that has addressed whether *First Options*, as a commercial arbitration case, should apply to cases that arise under section 301 of the LMRA. Oppos. Brief, p. 18. However, in the same breadth, Respondent notes that the Second Circuit, in the context of a Section 301 action, "limited *First Options* to the single arbitrability issue of whether the parties ever entered into a valid arbitration agreement at all." Oppos. Brief, p. 22.

Clearly, the Second Circuit not only applied but assessed astutely the impact of *First Options* within the context of a labor arbitration dispute. Moreover, contrary to Respondent's erroneous assertion to the contrary, Oppos. Brief, pp. 19-20, the Sixth Circuit in *Aircraft Braking Systems Corp. v. Local 856, UAW*, 97 F.3d 155 (9th Cir. 1996), *cert. den.* ___ U.S. ___, 117 S.Ct. 1311, 137 L.Ed.2d 475 (1997), applied *First Options* without hesitation in the context of a Section 301 action. *Id.* at 160; *see also Local 744, International Brotherhood of Teamsters v. Hinckley & Schmitt, Inc.*, 76 F.3d 162 (9th Cir. 1996); *Excel Corp. v. United Food and Commercial Workers*, 102 F.3d 1464, 1467 (8th Cir. 1996); Petition, pp. 22-25.

Thus, there is an ever widening split in the circuits regarding the applicability of *First Options* in the context of a labor dispute with the Ninth Circuit on one side of the chasm and all the other circuits who have addressed the issue on the other. Accordingly, this Court may grant Pacesetter's petition for a *writ of certiorari* on the ground that the decision below is in direct conflict with the decisions of at least four other circuits

that have applied *First Options* in disputes arising under Section 301 of the LMRA.

D. There are No Fundamental Differences in Policy Which Justify The Imposition of an Agreement to Arbitrate on an Unwilling Party.

Respondent asserts that the Ninth Circuit was justified in relying solely upon amorphous "fundamentally different policy concerns" between commercial and labor arbitration in determining that *First Options* has no viability in the labor arena. App., 12a. In essence, Respondent contends that labor and commercial arbitrations are governed by different statutes, that *First Options* merely cited "a few fundamental labor arbitration cases," and that the holding of First Options would have disastrous consequences for the collective bargaining process. Oppos. Brief, pp. 7-16. Respondent's characterization of the alleged policy differences applicable in this case and its description of *First Options* and that case's purported death knell effect on labor arbitrations is inaccurate to the say the least.

As previously noted, Petition pp.10-11, in *First Options*, this Court did not merely "cite a few labor cases," but rather reaffirmed and further refined the basic principles for judicial review of arbitration decisions articulated in forty years of Section 301 precedent. Further, the policy underlying the FAA is identical to the policy underlying judicial review in the Section 301 context: in both arenas, arbitration is favored. *Southland Corp. v. Keating*, 465 U.S. 1,10, 104 S.Ct. 852, 858, 79 L.Ed.2d 1 (1984).

Moreover, the application of *First Options* to labor arbitration cases where the party disputes the very existence of a contract to arbitrate presents neither a threat to the federal policy favoring arbitration nor infringes upon the arbitrator's role as the parties' agreed-upon contract interpreter. The dispute underlying this case does *not* involve a question of contract

interpretation where the arbitrator is required to "fill the gaps" for the vast array of circumstances that have not been considered or reduced to writing. App, 12a, citing *Desert Palace*, 94 F.3d at 1311. Rather, it involves the narrow legal question of whether a contract existed between the parties. Quite simply, Respondent has described no federal labor policy which favors the unilateral imposition of a labor contract upon a party who consistently disputes the existence of that contract.

CONCLUSION

Pacesetter respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with the Court's October 2, 1995 Order in this case, and consistent with the Court's decision in *First Options*.

Respectfully Submitted,

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